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No. _____

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In The

Supreme Court of the United States

JOAN GORE MILLIGAN,
Individually and for the benefit and on behalf of all others similarly situated,
Petitioner,

v.

STATE OF NORTH CAROLINA; THE NORTH CAROLINA DEPARTMENT OF REVENUE; MURIEL K. OFFERMAN, in her capacity as Secretary of the North Carolina Department of Revenue; RICHARD W. RIDDLE, in his capacity as Director of the Controlled Substance Tax Division of the North Carolina Department of Revenue; THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER; HARLAN E. BOYLES, in his capacity as Treasurer of the State of North Carolina,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

Petition for Writ of Certiorari

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26 pp

QUESTIONS PRESENTED

I. WHETHER THE NORTH CAROLINA SUPREME COURT PROPERLY APPLIED THIS COURT'S HOLDING IN *DEPARTMENT OF REVENUE OF MONTANA v. KURTH RANCH* IN CONCLUDING THAT THE STATE DRUG TAX IS NOT A CRIMINAL PENALTY, NOTWITHSTANDING THAT THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS EXAMINED THE DRUG TAX IN LIGHT OF *KURTH RANCH* AND DETERMINED THAT IT IS A CRIMINAL PENALTY WHICH MAY NOT BE ASSESSED WITHOUT CONSTITUTIONAL SAFEGUARDS?

II. WHETHER THE FEDERAL SUPREMACY CLAUSE REQUIRES THE NORTH CAROLINA SUPREME COURT TO FOLLOW THE CONSTITUTIONAL PRINCIPLES ENUNCIATED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT , WHERE THAT CIRCUIT COURT HAS REVIEWED THE NORTH DRUG TAX IN LIGHT OF THE DUE PROCESS CLAUSE AND THE PRINCIPLES ANNOUNCED BY THIS COURT IN *DEPARTMENT OF REVENUE OF MONTANA v. KURTH RANCH,* AND HAS RULED THAT THE NORTH CAROLINA DRUG TAX IS A CRIMINAL PENALTY?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CITATIONS TO OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 4

REASONS FOR GRANTING THE WRIT 7

1. Certiorari should be granted because the North Carolina Supreme Court has interpreted a federal constitutional question in a manner which directly conflicts with a ruling of the United States Court of Appeals for the Fourth Circuit, which consistently rules on matters of North Carolina law. 7

2. Certiorari should be granted because the North Carolina Supreme Court has held that North Carolina's Drug Tax is a civil rather than penal statute, thus interpreting the United States Constitution in a manner contrary to this Court's interpretation in *Department of Revenue of Montana v. Kurth Ranch* 16

3. Certiorari should be granted because the federal and state courts have issued conflicting decisions as to the proper interpretation and application of this Court's decision in *Department of Revenue of Montana v. Kurth Ranch*.....17

CONCLUSION 18

APPENDIX .....App. i

TABLE OF AUTHORITIES

CASES

Brunner v. Collection Division of Tax Commission,
326 Utah Adv. Rep. 26, 945 P.2d 687 (Utah 1997) 17

Bryant v. State,
660 N.E.2d 290 (Ind. 1995), *cert denied*
519 U.S. 926, 117 S.Ct. 293,
136 L.Ed2d 2131 (1998) 17

Com. v. Bird,
979 S.W.2d 915 (Ky.1998), *cert denied*
526 U.S. 1145, 119 S.Ct. 2019,
143 L.Ed2d 1031 (1999) 17

Commissioner of Revenue v. Mullins,
428 Mass. 406, 702 N.E.2d 1 (Mass. 1998) 17

Covelli v. Commissioner of Revenue Services,
668 A.2d 699 (Conn. 1995), *cert granted*
518 U.S. 1031, 116 S.Ct. 2577,
133 L.Ed 2d 1096 ((1996) 17

Department of Revenue of Montana v. Kurth Ranch,
511 U.S. 767, 114 S.Ct. 1937,
128 L.Ed.2d 767 (1996) ..... passim

Desimone v. Nevada,
996 P.2d 405 (2000) 17

Lynn v. West,
134 F.3d 882 (4th Cir. 1998), *cert denied*
525 U.S. 813, 119 S.Ct. 47 (1998) ..... passim

McMullin v. South Carolina Department of Revenue and Taxation,
321 S.C. 475, 469 S.E.2d 600 (S.C.1996) 17

Milligan v. State,
__ N.C. App. __, 522 S.E.2d 330 (1999), *rev. denied*, 358 N.C. 358, ___ S.E.2d ___, 2000 WL 28442 (2000) 1, 11

Milner v. State,
658 So.2d 500 (Ala. Civ. App. 1994) 17

Padavich v. Thalacker,
162 F.3d 521 (8th Cir.1998) 17

People v. Maurello,
932 P.2d 851 (Colo. Ct. App. 1997) 17

Wilson v. Department of Revenue,
169 Ill.2d 306, 662 N.E.2d 415 (Ill. 1996) 17

State v. Adams,
132 N.C.App. 819, 513 S.E.2d 588 (1999), *rev. denied*, 350 N.C. 836, __S.E.2d ___, *cert. denied, Adams v. North Carolina*, 120 S.Ct. 534, 145 L.Ed2d 414, 68 U.S.L.W. 3292 (1999) 6, 10, 11

State v. Ballenger,
123 N.C. App. 179, 472 S.E.2d 572 (1996), *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d 84 (1997), *cert denied* 522 U.S. 817, 118 S.Ct. 68, 139 Led2d 29 ..... passim

State v. Creason,
123 N.C.App. 495, 473 S.E.2d 771 (1996),
aff'd per curiam, 346 N.C. 165, 484 S.E.2d 525
(1997) 6, 10, 13, 16

State v. Foster,
132 N.C.App. 823, 519 S.E.2d 783, *rev. denied*,
350 N.C. 840, ___ S.E.2d ___, 1999 WL 609296,
cert. denied, 120 S.Ct. 534, 145 L.Ed2d 414 (1999)... 11, 12

State v. Gulledge,
257 Kan. 915, 896 P.2d 378 (Kan.1995) 17

State v. Lange,
531 N.W.2d 108 (Iowa 1995) 17

State v. McDowell,
310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) 6, 11

State v. Wambach,
___ N.C.App. ___, 526 S.E.2d 212 (2000) 11

State v. Woods,
___ N.C.App. ___, 524 S.E.2d 363, *rev. denied*,
___ N.C.___, ___ S.E.2d ___ 2000, WL 284455
(2000) 11, 15

STATUTES

N.C. Gen. Stat. § 105-267 4

N.C. Gen. Stat. § 105-113.105 ..... 1, 4, 8, 10

CONSTITUTIONS

U.S. CONST. art. VI cl. 2 2

U.S. CONST. amend. IV. 2, 5

U.S. CONST. amend. V 2, 5

U.S. CONST. amend. VI 3, 5

U.S. CONST. amend. XIV 3, 5

Petitioner Joan Gore Milligan ("Milligan"), respectfully requests that a writ of certiorari issue to review the judgment of the North Carolina Court of Appeals issued on 7 December 1999, which affirmed the trial court's dismissal of Milligan's civil cause of action seeking tax refunds based upon a challenge to the constitutionality of the North Carolina's Drug Tax, N.C. Gen. Stat. §105-113.105 *et seq.* (1996). (App. to Pet. for Cert. pp. 28-29) The North Carolina Supreme Court dismissed Milligan's appeal and denied her Petition for Discretionary Review on 2 March 2000. 351 N.C. 358, ____ S.E.2d _____, 2000 WL 284442 (March 02, 2000) (App. to Pet. for Cert. pp. 3-5)

OPINIONS BELOW

The North Carolina Supreme Court's dismissal of Milligan's appeal and denial of her Petition for Discretionary Review is reprinted in the Appendix, p.3. The opinion of the North Carolina Court of Appeals from which Milligan appealed and now seeks certiorari, *Milligan v. State*, ___ N.C. App. _____, 522 S.E.2d 330 (1999) appears in the Appendix, pp. 5-9. Milligan's original Complaint and Amendment thereto appear in the Appendix, pp.12-27.

BASIS FOR JURISDICTION

The judgment of the North Carolina Court of Appeals affirming the dismissal of Milligan's cause of action as set forth above was filed on 7 December 1999, ____ N.C. App. _____, 522 S.E.2d 330 (1999). (App. to Pet. Cert. pp. 5-9) A Notice of Appeal and Petition for Discretionary Review were timely filed with the North Carolina Supreme Court on 24 January 2000. The Notice of Appeal was dismissed and the Petition for Discretionary Review denied on 2 March 2000. 351 N.C. 358, ____ S.E.2d ____, 2000 WL 284442 (March 02, 2000). This Petition is filed within ninety (90) days of dismissal of Milligan's appeal and denial of her Petition for

Discretionary Review to the Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 and Rules 10, 12, 13, 14, 15, and 16 of the Rules of the *Supreme Court of the* United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved herein are:

U.S. Const. art. VI cl.2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.Const. Amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.Const. Amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless

on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.Const. Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S.Const. Amend. XIV, Sec. 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The North Carolina Drug Tax, N.C. Gen. Stat. §105-113.105 *et seq.* (1996) is reprinted in the Appendix pp. 27-39.

STATEMENT OF THE CASE

Milligan sought tax refunds in North Carolina state court pursuant to N.C. Gen. Stat. §105-267 (App. to Pet. for Cert. p. 40) on behalf of herself and the class she seeks to represent. She alleged that the North Carolina Drug Tax, N.C. Gen. Stat. §105-113.105 *et seq.* (1996) is unconstitutional in that it is in fact a criminal penalty, yet those from whom the tax is collected are not provided constitutionally guaranteed procedural safeguards. The North Carolina Attorney General, acting on behalf of the North Carolina Department of Revenue, successfully moved to dismiss Milligan's claim on the basis that she failed to state a claim for relief.

The North Carolina Court of Appeals affirmed the trial court's dismissal of the claim and the North Carolina Supreme Court dismissed Milligan's appeal and denied her petition for discretionary review.

STATEMENT OF THE FACTS

Milligan's amended complaint alleges that the North Carolina Drug Tax, as enforced, is a criminal penalty, that Milligan and others similarly situated were not afforded appropriate procedural safeguards, and therefore enforcement of the North Carolina Drug Tax violates federal and state constitutional provisions guaranteeing due process of law. (App. to Pet. Cert. pp.11-26).

On September 23, 1996, Respondent North Carolina Department of Revenue assessed a $12,252.95 tax liability

against Milligan for drugs which had earlier been seized by law enforcement officials and which were not in her possession at the time of assessment. Milligan was arrested and charged criminally for possessing the same drugs on which her tax liability was based. She filed a timely objection challenging the constitutionality of the Drug Tax assessment, and paid $8,000.00 as a penalty on March 4, 1998. On March 26, 1998, Milligan timely sent a written protest and demand to the Secretary of the Department of Revenue, demanding a refund on the tax paid. The protest specifically alleged that the North Carolina Drug Tax was unconstitutional, based upon the opinion of the United States Court of Appeals for Fourth Circuit in *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998) which held in pertinent part that "North Carolina's Drug Tax, like Montana's Dangerous Drug Tax, has enough punitive features that its nature is that of a criminal penalty, not a civil tax." *Id.* at 589. When the taxes were not refunded, Milligan commenced action in state court.

Milligan's amended complaint alleges that the North Carolina Drug Tax and the actions of the Respondents in enforcing that tax have been arbitrary and capricious and not in accordance with safeguards which attach when a state seeks to enforce a criminal penalty. Her complaint alleges violations of the United States Constitution (primarily the Fourth, Fifth, Sixth, and Fourteenth Amendments), and seeks a refund of all taxes which were unlawfully collected as part of the enforcement of the North Carolina Drug Tax. The trial court dismissed the complaint for failure to state a claim for relief.

The North Carolina Court of Appeals affirmed, holding that

> This Court has held that the Drug Tax does not contain the "punitive characteristics" necessary to transform it into a criminal

> penalty. *State v. Ballenger*, 123 N.C. App. 179, 184, 472 S.E.2d 572, 575 (1996), *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d84, *cert. denied*, 522 U.S. 817, 139 L. Ed. 2d 29 (1997); *see also State v. Adams*, --- N.C. App. ---, 513 S.E.2d 588, *disc. review denied*, 350 N.C. 836, --- S.E.2d --- (1999); *State v. Creason*, 123 N.C. App. 495, 473 S.E.2d 771 (1996), *aff'd per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997).

522 S.E.2d at 331 (App. to Pet. for Cert. p. 7-8)

The North Carolina Court of Appeals also addressed the Fourth Circuit's ruling that the North Carolina Drug Tax is a criminal penalty:

> We are aware the Fourth Circuit has held the North Carolina Drug Tax to constitute a criminal penalty. *Lynn*, 134 F.3d at 592. We are not, however, bound by that decision. *Adams*, --- N.C. App. at ---, 513 S.E.2d at 589; *see also State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (state courts should treat "decisions of the United States Supreme Court as binding and accord[] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command").

522 S.E.2d at 331 FN 2. (App. to Pet. for Cert. p. 8)

The North Carolina Supreme Court dismissed Petitioner's appeal and denied her petition for discretionary review.

REASONS FOR GRANTING THE WRIT

1. **Certiorari should be granted because the North Carolina Supreme Court has interpreted a federal constitutional question in a manner which directly conflicts with a ruling of the United States Court of Appeals for the Fourth Circuit, which consistently rules on matters of North Carolina law.**

It is important for this Court to grant certiorari in order to resolve a direct and recurring conflict between the United States Court of Appeals for the Fourth Circuit on the one hand, and North Carolina appellate courts on the other. Additionally, it is important for this Court to finally determine whether the federal Supremacy Clause, U.S. Const. Article VI., cl.2, requires that the state court follow the constitutional rulings of the federal circuit in which the state court is located.

A. The Conflicting Interpretations of North Carolina's Drug Tax

The Fourth Circuit has held that the North Carolina Drug Tax, when evaluated in light of the test applied by this Court in *Department of Revenue of Montana v.Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1996), amounts to a criminal penalty which may not be imposed without constitutional safeguards. In *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), *cert. denied*, 525 U.S. 813, 119 S.Ct. 47 (1998) the Fourth Circuit analyzed the Drug Tax and concluded:

> [T]he Drug Tax contains no features that allow us to distinguish *Kurth Ranch*. The rate of taxation is even steeper than the tax in

> *Kurth Ranch*. Unlike the application of a normal income tax on illegal activity, the Drug Tax is enforced only against criminals. [footnote omitted] And unlike the marijuana tax upheld in *Sanchez*, the Drug Tax does not contemplate lawful dealings in the product that is the subject of the tax. The Drug Tax singles out a class of persons who have engaged in criminal activity and subjects the class to a rate of taxation far beyond that faced by any legitimate taxpayer.

134 F.3d at 592.

The North Carolina appellate courts, on the other hand, consistently hold that the North Carolina Drug Tax contains features which distinguish it from the tax which this Court characterized as a penalty in *Kurth Ranch*, *supra*. In the most exhaustive analysis of the Drug Tax by a North Carolina appellate court, a panel of the Court of Appeals in *State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572, *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d 84 (1997), *cert. denied*, 522 U.S. 817, 118 S.Ct. 68, 139 L.Ed2d (1997) held that the North Carolina Drug Tax is distinguishable from the tax which this Court held to be a penalty in *Kurth Ranch*. The panel concluded,

> The North Carolina Controlled Substance Tax, G.S. § 105-113.105 *et seq*., as it was in effect at all times pertinent to this case, however, contains neither of the "unusual features" upon which the Supreme Court relied in *Kurth Ranch* to conclude that Montana's dangerous drug tax constituted punishment for double jeopardy purposes. The North Carolina Controlled Substance Tax is not predicated upon whether the taxpayer in

possession of the controlled substance has been arrested or charged with criminal conduct, nor is it assessed on property that necessarily has been confiscated or destroyed. Specifically, the North Carolina Controlled Substance Tax provides that a "tax is levied on controlled substances and counterfeit controlled substances possessed by dealers ..." at various rates depending on the type of controlled substance possessed. N.C. Gen.Stat. § 105-113.107 (1992). A dealer is defined as:

> [a] person who in violation of G.S. 90-95 possesses, delivers, sells, or manufactures more than 42.5 grams of marijuana, seven or more grams of any other controlled substance or counterfeit controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance or counterfeit controlled substance that is not sold by weight.

N.C. Gen.Stat. § 105-113.106 (1992 & 1994 Cum.Supp.)

The panel distinguished the tax held to be a penalty in *Kurth Ranch:*

> Because the North Carolina tax becomes payable within forty- eight hours after the taxpayer comes into possession of the substance, it is not a tax on confiscated goods,

> as was the case with the Montana tax, which became due only upon the taxpayer's arrest for pos-session of the substance. To the contrary, the dealer is not required, when paying the tax, to disclose his or her identity, G.S. § 105-113.108, and any information obtained pursuant to this statute is confidential and cannot be used in a criminal prosecution other than a prosecution for failure to comply with the tax statute itself. N.C. Gen.Stat. § 105-113.112 (1992 & 1994 Cum.Supp.)

123 N.C. App. at 179, 472 S.E.2d at 572.

The tension between *Lynn* and *Ballenger* (and its progeny) has produced a series of state court decisions in which North Carolina courts refuse to adopt the constitutional analysis employed by the United States Court of Appeals for the Fourth Circuit. A brief review of these decisions is in order.

In *State v. Adams,* 132 N.C.App. 819, 513 S.E.2d 588, *cert. denied,, Adams v. North Carolina,*____ U.S.____, 120 S.Ct. 534, _____ L.Ed.2d _____ , 68 U.S.L.W. 3292 (1999) a criminal defendant argued in state court that the North Carolina Drug Tax was a criminal penalty and thus the state's prosecution after its assessment of the tax violated the Double Jeopardy clause; a state trial court agreed and dismissed the prosecution, relying on the Fourth Circuit's decision in *Lynn.* The North Carolina Court of Appeals reversed and refused to follow *Lynn,* noting that:

> Defendant does not dispute that *[State v.] Ballenger* and *[State v.] Creason* upheld assessment and collection of the Drug Tax pursuant to G.S. Sec. 105-113.105 through 105-113.113 against a constitutional chal-

> lenge indistinguishable from that mounted by defendant herein. [citations omitted] Notwithstanding, in his appellate brief and at oral argument, defendant proffered the decision of the United States Court of Appeals for the Fourth Circuit in *Lynn v. West*, 134 F.3d 582 (4th Cir.1998), cert. denied, --- U.S. ----, 119 S.Ct. 47, 142 L.Ed.2d 36 (1998), as sustaining the trial court's action. However, with the exception of decisions of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State. See *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (state courts should treat "decisions of the United States Supreme Court as binding and accord[ ] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command").

132 N.C. App. at 820, 513 S.E.2d at 588. See also, *State v. Woods*, _____ N.C. App. _____, 524 S.E.2d 363, *rev. denied*, ____ N.C. ____, ____S.E.2d _____ (2000) (rejecting defendant's contention that drug tax is a penalty and refusing to follow *Lynn v. West); State v. Wambach* ____ N.C. App. _____, 526 S.E.2d 212 (2000) (dismissing habeas corpus appeal and noting that in connection with *Lynn*, "federal appellate decisions are not binding upon either the appellate or trial courts of this State.") *State v. Foster*, 132 N.C. App. 823, 519 S.E.2d 783, *rev. denied*, 350 N.C. 840, ____ S.E.2d ____, *cert. denied*, 120 S.Ct. 534, 145 L.Ed.2d 414 (1999). Likewise, in the present case, the North Carolina appellate courts affirmed the dismissal of Milligan's cause of action on the basis of *Ballenger, supra* and *Adams, supra*, and refused to follow *Lynn v. West, supra. Milligan*, __ N.C.

App. at __, 522 S.E.2d at 331-32 (App. to Pet. for Cert. pp. 5-8).

The Fourth Circuit explicitly rejects both the holding and reasoning the North Carolina Court of Appeals' decision in *Ballenger* and subsequent cases, all of which have been affirmed without opinion by the North Carolina Supreme Court. See, *Lynn v. West,* 134 F.3d 582, 591 (rejecting North Carolina Attorney General's argument based upon *Ballenger); United States v. Anderson,* 2000 WL 620308 (4th Cir. May 15, 2000) , reprinted in Appendix to Petition at pp.40-47, (refusing to apply *Ballenger* and noting that "in this forum to say the least, *Lynn v. West* is binding").

The foregoing decisions underscore the recurring tension between North Carolina state courts and the Fourth Circuit on a constitutional question which implicates both the Due Process and Double Jeopardy clauses. The repeated certiorari petitions in which litigants have requested this Court to review North Carolina's Drug Tax in light of *Kurth Ranch* reflect a compelling need for this Court to resolve the state-federal conflict which has developed in connection with the North Carolina Drug Tax.

This Court has repeatedly refused to grant certiorari in cases where state litigants have challenged the North Carolina Drug Tax. See e.g., *State v. Ballenger, supra; State v. Adams, supra; State v. Foster, supra.* Yet this Court has also refused to grant certiorari in response to the Fourth Circuit's decision that the North Carolina Drug Tax constitutes a criminal penalty. *Lynn v. West. supra.* Petitioner respectfully submits that this Court is the only Court empowered to finally resolve the conflict between the Fourth Circuit and the North Carolina appellate courts in their respective interpretations of the Due Process and Double Jeopardy clauses of the United States Constitution.

The split between the Fourth Circuit and the North Carolina appellate courts is not a mere academic disagreement, but rather a division with significant practical implications. For example, in *United States v. Anderson,*

2000 WL 620308 (4th Cir. May 15, 2000) (App. to Pet. for Cert. pp. 40-47), a federal criminal defendant was sentenced to life in prison, based upon his having been twice convicted of felony drug offenses in North Carolina. On appeal the defendant argued that one of the predicate drug convictions used to enhance his federal sentence was obtained in violation of the Double Jeopardy clause, inasmuch as he had been assessed the Drug Tax prior to his state drug conviction. The Fourth Circuit agreed with the defendant's contention and found that the previous state drug conviction could not be used to enhance defendant's sentence. The Fourth Circuit's reasoning dramatically emphasizes the nature of the federal-state conflict:

> Prior to Anderson's conviction on the drug charge, North Carolina courts had determined that the North Carolina drug tax was not a criminal penalty for purposes of the Double Jeopardy Clause. See *State v. Ballenger*, 472 S.E.2d 572, 572-75 (N.C.Ct.App.1996), *aff'd per curiam*, 481 S.E.2d 84, *cert. denied*, 522 U.S. 817 (1997); *State v. Creason*, 473 S.E.2d 771, 772 (N.C.Ct.App.1996), *aff'd per curiam*, 484 S.E.2d 525 (1997). A subsequent North Carolina case even pointed out that state courts were not bound by the Fourth Circuit *Lynn v. West* decision, but rather were bound by the state court pronouncements on the matter. See *State v. Adams*, 513 S.E.2d 588, 589 (N.C.Ct.App.1999).
>
> *In this forum, to say the least, Lynn v. West is binding. And pursuant to Lynn v. West Anderson's subsequent North Carolina drug conviction constituted double jeopardy.* As a result, the conviction cannot be used as a predicate offense under § 841(b)(1)(A). We

> thus vacate Anderson's sentence and remand for resentencing under the applicable sentencing guidelines.

United States v. Anderson, 2000 WL 620308,(App. to Pet. for Cert. p. 46)(emphasis supplied)

Undoubtedly many federal and state prisoners have been convicted of North Carolina felony drug offenses after a Drug Tax assessment. In light of *Lynn v. West,* and *United States* v. *Anderson,* federal and state prisoners will continue to attack the validity of felony drug convictions obtained after a defendant has been assessed the Drug Tax. Only this Court has the power and authority to *finally* resolve the issue which has divided the state and federal courts--that is, whether the North Carolina Drug Tax is a criminal penalty when viewed in light of this Court's opinion in *Kurth Ranch.*

In fact, this Court granted certiorari in *Kurth Ranch* for precisely the same reason advanced here: that Montana's Supreme Court was directly at odds with the federal Ninth Circuit Court of Appeals as to whether Montana's drug tax constituted a criminal penalty. *Kurth Ranch*, 511 U.S. at 775-76, 114 S. Ct. at 1944. As in *Kurth Ranch*, certiorari should be granted in this case because the North Carolina Supreme Court is, and will continue to be, directly at odds with the Fourth Circuit regarding the constitutionality of the Drug Tax.

B. This Court Has Not Squarely Resolved Whether the Supremacy Clause Requires State Courts to Follow The Decisions of Federal Circuit Courts on Matters of Constitutional Law

In *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1992) Justice Thomas criticized the Sixth Circuit's "fundamental misunderstanding" of the Supremacy Clause in that the Circuit Court concluded that an Arkansas court is bound to follow Sixth Circuit precedent on a matter of federal law. Justice Thomas observed:

> In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located. See *Steffel v. Thompson*, 415 U.S. 452, 482, n. 3, 94 S.Ct. 1209, 1214, n. 3, 39 L.Ed.2d 505 (1974) (REHNQUIST, J.,concurring); United States ex rel. *Lawrence v. Woods*, 432 F.2d 1072, 1075-1076 (CA7 1970), *cert. denied*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1971);

506 U.S. at 375-376, 113 S.Ct. at 846.

This Court has never fully resolved the issue addressed by Justice Thomas in *Fretwell*--whether a state court must follow the constitutional precedent of the federal circuit in which the state court is located. Authorities are divided as to the appropriate precedential value of a federal court's ruling on a question of federal constitutional law. See, 20 Am. Jur.2d, *Courts, § 171* (1995); 21 C.J.S., *Courts, § 158* (1990). This Court should grant certiorari to finally

resolve whether state courts are bound to follow circuit court decisions on matters of federal constitutional law.

2. Certiorari should be granted because the North Carolina Supreme Court has held that North Carolina's Drug Tax is a civil rather than penal statute, thus interpreting the United States Constitution in a manner contrary to this Court's interpretation in *Department of Revenue of Montana v. Kurth Ranch*.

In *Kurth Ranch* this Court analyzed Montana's Drug Tax under Double Jeopardy principles and ruled that it was a criminal penalty in that it: (1) was enacted for a deterrent purpose; (2) imposed a high rate of taxation; (3) was conditioned on the commission of a crime; and (4) had no relationship to a lawful possession of a controlled substance.

Two years after *Kurth Ranch*, the North Carolina Supreme Court adopted the reasoning of the North Carolina Court of Appeals in *Ballenger, supra* and held that North Carolina's Drug Tax is not a criminal penalty for Double Jeopardy purposes because the Drug Tax is not predicated upon the commission of a crime and is not assessed on property that necessarily has been confiscated or destroyed. Accord, *State v. Creason*, 123 N.C.App. 495, 473 S.E.2d 771 (1996), *aff'd per curiam*, 346 N.C. 65, 484 S.E.2d 525 (1997). Petitioner has attacked the North Carolina Drug Tax as enforced, and contends that indeed the Drug Tax is enforced only against persons charged with a criminal offense, and always assessed against property that has been confiscated or destroyed. The North Carolina courts have avoided reaching Petitioner's contentions by ignoring the reasoning of the Fourth Circuit and simply relying on the reasoning of the North Carolina Court of Appeals, which interpreted and examined only the facial validity of the Drug Tax.

3. Certiorari should be granted because the federal and state courts have issued conflicting decisions as to the proper interpretation and application of this Court's decision in *Department of Revenue of Montana v. Kurth Ranch*.

This Court's decision in *Kurth Ranch* has been applied in an inconsistent and conflicting manner by federal and state courts, which have reached divergent results in analysis of state drug tax statutes. Several federal and state courts have examined state drug taxes in light of *Kurth Ranch* and concluded that a drug tax, such as North Carolina's, amounts to a criminal penalty: *Lynn v. West*, *supra*; *Desimone v. Nevada*, 996 P.2d 405 (Nev. 2000); *Commissioner of Revenue v. Mullins*, 428 Mass. 406, 702 N.Ed 1(Mass. 1998); *Brunner v. Collection Division of Tax Commission*, 326 Utah Adv. Rep. 26, 945 P.2d 687 (Utah 1997); *Wilson v. Department of Revenue*, 169 Ill.2d 306, 662 N.E.2d 415 (Ill. 1996); *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995), *cert denied*, 519 U.S. 926, 117 S.Ct. 293, 136 L.Ed2d 2131 (1998); *People v. Maurello*, 932 P.2d 851 (Colo. Ct. App. 1997).

In contrast, other courts reject Double Jeopardy challenges to drug tax statutes similar to North Carolina's, concluding that the drug tax does not impose a criminal penalty. *Padavich v. Thalacker*, 162 F.3d 521 (8th Cir.1998); *Com. v. Bird*, 979 S.W.2d 915 (Ky.1998), *cert denied*, 526 U.S. 1145, 119 S.Ct. 2019, 143 L.Ed2d 1031 (1999); *Covelli v. Commissioner of Revenue Services*, 668 A.2d 699 (Conn. 1995), *cert granted*, 518 U.S. 1031, 116 S.Ct. 2577, 133 L.Ed2d 1096 (1996); *Milner v. State*, 658 So.2d 500 (Ala. Civ. App. 1994); *State v. Lange*, 531 N.W.2d 108 (Iowa 1995); *State v. Gulledge*, 896 P.2d 378 (Kan.1995); *McMullin v. South Carolina Department of Revenue and Taxation*, 469 S.E.2d 600 (S.C.1996); *Ex Parte Ward*, 964 S.W.2d 617 (Tex.Cr.App. 1998).

This Court should grant certiorari to resolve the conflicting interpretations of the *Kurth Ranch* decision. Principles of constitutional law should be uniformly enforced and not depend on the accident of a citizen's residence.

CONCLUSION

North Carolina's Drug Tax has been declared a criminal penalty by the Fourth Circuit in *Lynn v. West*, *supra*, which conscientiously and correctly applied the teaching of this Court in *Kurth Ranch*. The Fourth Circuit found that North Carolina's Drug Tax contained all of the elements of a criminal penalty. However, the North Carolina Court of Appeals has refused to follow *Lynn v. West* and has instead rested upon its own interpretation of *Kurth Ranch*, while specifically disregarding a federal appellate court's constitutional analysis of a state statute. Certiorari should be granted by this Court to resolve the state-federal conflict and to clarify the precedential effect to be given a federal court's constitutional review of a state statute.

This the 31st day of May, 2000.

Stanley F. Hammer
Counsel of Record for Petitioner

Scott F. Wyatt
Counsel for Petitioner

OF COUNSEL:

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(2) 991938 MAY 31 2000

No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOAN GORE MILLIGAN,
Individually and for the benefit and on behalf of all others similarly situated,
Petitioner,

v.

STATE OF NORTH CAROLINA; THE NORTH CAROLINA DEPARTMENT OF REVENUE; MURIEL K. OFFERMAN, in her capacity as Secretary of the North Carolina Department of Revenue; RICHARD W. RIDDLE, in his capacity as Director of the Controlled Substance Tax Division of the North Carolina Department of Revenue; THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER; HARLAN E. BOYLES, in his capacity as Treasurer of the State of North Carolina,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

Appendix to Petition for Writ of Certiorari

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51 pp

TABLE OF CONTENTS
Appendix to Petition

Order
North Carolina Court of Appeals
entered March 30, 2000 1

Order
Supreme Court of North Carolina
entered March 2, 2000 3

Opinion
North Carolina Court of Appeals
entered December 7, 1999 5

Order and Judgment of Dismissal
In the General Court of Justice
Superior Court Division for
Wake County
entered October 23, 1998 9

Complaint
In the General Court of Justice
Superior Court Division for
Wake County
filed July 6, 1998 11

Amendment to Complaint as of Right
In the General Court of Justice
Superior Court Division for
Wake County
entered September 23, 1998 24

N.C. Gen Stat. §105-113.105 (1996)
Purpose 27

N.C. Gen. Stat. §105-113.106 (1996)
Definitions 28

N.C. Gen. Stat. §105-113.107 (1996)
Excise tax on controlled substances 30

N.C. Gen. Stat. §105-113.107A (1996)
Exemptions 31

N.C. Gen. Stat. §105-113.108 (1996)
Reports; revenue stamps 32

N.C. Gen. Stat. §105-113.109 (1996)
When tax payable 33

N.C. Gen. Stat. §105-113.110 (1996)
Repealed by Session Laws 1995, c.340, s.1, effective
October 1, 1995 34

N.C. Gen. Stat. §105-113.110A (1996)
Interest and penalty 34

N.C. Gen. Stat. §105-113.111(1996)
Assessments 35

N.C. Gen. Stat. §105-113.112 (1996)
Confidentiality of information 36

N.C. Gen. Stat. §105-113.113 (1996)
Use of tax proceeds 37

N.C. Gen. Stat. §105-267 (1996)
Taxes to be paid; suits for recovery of taxes 39

Opinion
United States Court of Appeals
for the Fourth Circuit
United States v. Jevan Anderson
entered May 15, 2000 40

No: COA99-14

TENTH DISTRICT
NORTH CAROLINA COURT OF APPEALS

****

From Wake County

Joan Gore MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,
Plaintiff,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
of the State of North Carolina,
Defendants.

(98-CVS-7891)
Entered: March 30, 2000

****

ORDER

The Motion to Dismiss the Appeal is Allowed and Petition for Discretionary Review to review the decision of the North Carolina Court of Appeals filed on the 7th day of

December 1999 was denied by order of the North Carolina Supreme Court on the 2nd day of March 2000, and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Wake County North Carolina that the North Carolina Supreme Court has allowed the Motion to Dismiss the Appeal and denied the Petition for Discretionary Review filed by the Plaintiff in this cause.

WITNESS my hand and official seal this the 30th day of March 2000.

/s/_____
John H. Connell
Clerk, North Carolina Court of Appeals

/s/_____
Deputy Clerk, North Carolina Court of Appeals

Orig. to CSC
Copy to:
Mr. Scott F. Wyatt, Attorney at Law, For Joan G. Milligan
Mr. William E. Wheeler
Mr. Stanley F. Hammer
Ms. Norma S. Harrell,
Special Deputy Attorney General, For State of N.C.
Mr. Christopher E. Allen,
Assistant Attorney General, For State of N.C.

No: 37P00

SUPREME COURT OF NORTH CAROLINA

****

Joan Gore MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated
Plaintiff,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
of the State of North Carolina.
Defendants.

Scott F. Wyatt, for Milligan.
Stanley F. Hammer, for Milligan.
Norma S. Harrell, Special Deputy Attorney General,
for State.

Entered: March 2, 2000.

****

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiff in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendant, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

> "Allowed by order of the Court in conference,
> this the 2nd day of March 2000."
>
> /s/ Freeman, J.
> For the Court"

Upon consideration of the petition filed by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> "Denied by order of the Court in conference,
> this the 2nd day of March 2000."
>
> /s/ Freeman, J.
> For the Court"

N.C., 2000.

No: COA 99-14

TENTH DISTRICT
NORTH CAROLINA COURT OF APPEALS

****

From Wake County

Joan Gore MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,
Plaintiff,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
of the State of North Carolina,
Defendants.

(98-CVS-7891)
Entered: Dec. 7, 1999.

****

OPINION

Appeal by plaintiff from judgment filed 23 October 1998 by Judge B. Craig Ellis in Wake County Superior Court. Heard in the Court of Appeals 19 October 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Norma S. Harrell, for the State. Wyatt Early Harris & Wheeler, L.L.P., by Scott F. Wyatt, William E. Wheeler, and Stanley F. Hammer, High Point, for plaintiff-appellant.

GREENE, Judge.

Joan Gore Milligan (Plaintiff), individually and for the benefit and on behalf of those similarly situated, appeals from an Order entering a Rule 12(b)(6) dismissal of the complaint filed against the State of North Carolina; the North Carolina Department of Revenue (Department of Revenue); Muriel K. Offerman, in her capacity as Secretary of the Department of Revenue; Richard W. Riddle, in his capacity as Director of the Controlled Substance Tax Division of the Department of Revenue; the North Carolina Department of State Treasurer; and Harlan E. Boyles, in his capacity as Treasurer of the *331 State of North Carolina (collectively, Defendants). Plaintiff's complaint requests refunds of taxes paid pursuant to Article 2D, Chapter 105 of the North Carolina General Statutes. N.C.G.S. ch. 105, art. 2D (1995) (amended 1997 & Supp.1998). These statutes were known as the "North Carolina Controlled Substance Tax" (Drug Tax).[1]

The allegations of the complaint reveal that on 8 December 1995, law enforcement officers seized marijuana from Plaintiff's home and arrested her for possession with intent to manufacture, sell, or deliver that same marijuana, as well as for maintaining both a place and a vehicle to keep controlled substances. On 23 September 1996, pursuant to N.C. Gen.Stat. § 105-113.111, the Department of Revenue assessed a tax liability of $12,252.95 against Plaintiff for taxes, penalties, and interest due on the approximately 2,227

[1] On 1 October 1997 the legislature substituted "Unauthorized Substances Taxes" for "Controlled Substance Tax" in the heading of Article 2D, Chapter 105.

grams of non-tax paid marijuana. Plaintiff paid the tax liability under protest and requested a refund pursuant to section 105-267. The refund was denied and Plaintiff filed her complaint contesting the validity of the tax. In the complaint it is alleged the Drug Tax is a "criminal penalty," "its enforcement must conform to the constitutional safeguards that accompany criminal proceedings," and Plaintiff was not provided any of these constitutional safeguards. It is also alleged that "Defendants have been the most aggressive of the states in enforcing [the] tax on illegal drugs."

The single issue is whether the Drug Tax is a criminal penalty.

Plaintiff argues that because the Drug Tax is a criminal penalty, its assessment and collection must comply with all the procedural safeguards required for criminal proceedings. It follows, Plaintiff contends, the statutes' failure to provide these safeguards requires a holding that the statutes are unconstitutional. We disagree.

A tax may be " 'so punitive either in purpose or effect' as to 'transfor [m] what [may have been] intended as a civil remedy into a criminal penalty.' " Hudson v. United States, 522 U.S. 93, 99, 118 S.Ct. 488, 493, 139 L.Ed.2d 450, 459 (1997) (citations omitted). If treated as a criminal penalty, "its enforcement must conform to the constitutional safeguards that accompany criminal proceedings." Lynn v. West, 134 F.3d 582, 593 (4th Cir.1998), cert. denied, 525 U.S. 813, 119 S.Ct. 47, 142 L.Ed.2d 36 (1998). Thus, the taxpayer would be entitled to "all of the criminal-procedure guarantees of the Fifth and Sixth Amendments." Id.

This Court has held that the Drug Tax does not contain the "punitive characteristics" necessary to transform it into a criminal penalty. State v. Ballenger, 123 N.C.App. 179, 184, 472 S.E.2d 572, 575 (1996), aff'd per curiam, 345 N.C. 626, 481 S.E.2d 84, cert. denied, 522 U.S. 817, 118 S.Ct. 68, 139 L.Ed.2d 29 (1997); see also State v. Adams, 132 N.C.App. 819, 513 S.E.2d 588, disc. review denied, 350

N.C. 836, --- S.E.2d ---- (1999); State v. Creason, 123 N.C.App. 495, 473 S.E.2d 771 (1996), aff'd per curiam, 346 N.C. 165, 484 S.E.2d 525 (1997).[2]

We acknowledge that our previous opinions on the Drug Tax were criminal proceedings whereas the present case is a civil proceeding. This distinction, however, is not material as the same issue is presented: whether the Drug Tax constitutes a criminal penalty. Because the Drug Tax does not constitute a criminal penalty, the Plaintiff was not entitled to the procedural safeguards required for criminal proceedings. Accordingly, *332 the trial court correctly dismissed the complaint.[3]

Affirmed.

Judges WALKER and HUNTER concur.

---

[2] We are aware the Fourth Circuit has held the North Carolina Drug Tax to constitute a criminal penalty. Lynn, 134 F.3d at 592. We are not, however, bound by that decision. Adams, 132 N.C.App. at 820, 513 S.E.2d at 589; see also State v. McDowell, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (state courts should treat "decisions of the United States Supreme Court as binding and accord[ ] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command").

[3] Plaintiff also argues the Drug Tax is unconstitutional "as applied." The single allegation in support of this claim is that the State has been "aggressive" in enforcing the tax on illegal drugs. This cannot support a claim that the statute is unconstitutional "as applied." This claim can be supported only upon a showing that the State has enforced the statute in some discriminatory or arbitrary manner. See generally Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994); Grace Baptist Church v. City of Oxford, 320 N.C. 439, 358 S.E.2d 372 (1987); Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971). There are no allegations that the State has engaged in any discriminatory or arbitrary practices with Drug Tax enforcement.

FILE NO. 98CvS 7891

NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY

****

Joan Gore MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,
Plaintiff,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
of the State of North Carolina,
Defendants.

Entered: October 23, 1998

****

ORDER AND JUDGMENT
OF DISMISSAL

This matter came on before the undersigned presiding judge in the Wake County Courthouse at a regularly

scheduled session of Wake County Superior Court on October 22, 1998. The matter was heard on defendants' motion to dismiss for failure to state a claim upon which relief may be granted, pursuant to N.C.G.S. §1A-1, Rule 12(b)(6). Counsel for all parties were present and participated.

The Court having considered matters of record, including defendants' motion to dismiss and the parties' memoranda of law, and the Court having heard argument from counsel for all parties the court concludes that defendants are entitled to judgment as a matter of law and that the motion to dismiss should be allowed.

NOW, THEREFORE, it is hereby ORDRED, ADJUDGED, AND DECREED that defendants' motion to dismiss should be and hereby is allowed and that this action should be and hereby is dismissed in its entirety.

The parties stipulate that this Order and Judgment may be signed out of court, out of session, out of term, and out of county, if necessary.

This the 23 day of October, 1998.

/s/
B. Craig Ellis,
Superior Court Judge Presiding

FILE NO. 98CvS

NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY

****

JOAN GORE MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,
Plaintiff,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
Of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
Of the State of North Carolina,
Defendants.

Filed: July 6, 1998

****

COMPLAINT

JOAN GORE MILLIGAN, Plaintiff herein, individually and for the benefit and on behalf of all others similarly situated, complains of Defendants and alleges and says:

ALLEGATIONS RELATING TO NAMED PARTIES

1. Plaintiff is a resident of Leland, Brunswick County, North Carolina.
2. Upon information and belief, Defendant State of North Carolina is a sovereign state, a part of the United States of America and all matters complained of herein were and are being committed by virtue of the purported power and authority of said State officials, agents, employees, agencies, departments and instrumentalities thereof. Defendant State of North Carolina is legally responsible for the actions and conduct of its employees of the North Carolina Department of Revenue and the North Carolina Department of State Treasurer. Defendant State of North Carolina is capable of being sued in this action pursuant to N.C. Gen. Stat. § 105-267 and other applicable statutes and law.
3. Upon information and belief, Defendant North Carolina Department of Revenue is an agency or department of the State of North Carolina, is charged with the administration of state tax laws, is legally responsible for the actions and conduct of its employees of the North Carolina Department of Revenue, is located in Raleigh, Wake County, North Carolina, and is capable of being sued in this action pursuant to N.C. Gen. Stat. § 105-267 and other applicable statutes and law. Defendant North Carolina Department of Revenue is responsible for collecting and enforcing North Carolina's Controlled Substance Drug Tax, N.C. Gen. Stat. §§ 105-113.105 through 105-113.113 (hereinafter "Drug Tax").
4. Upon information and belief, Defendant Muriel K. Offerman is a resident of Wake County, North Carolina, and is Secretary of the North Carolina Department of Revenue in Raleigh, Wake County, North Carolina. In her official capacity, Defendant

Offerman is responsible for collecting and enforcing the Drug Tax, is responsible for the conduct and actions of the employees of the North Carolina Department of Revenue, and is capable of being sued in this action pursuant to N.C. Gen. Stat. § 105-267 and other applicable statutes and law. Defendant Offerman is, and would be, responsible for issuing refunds to taxpayers of taxes paid by such taxpayers from the enforcement and collection of the illegal and/or unconstitutional Drug Tax. Defendant Offerman has authority over the State Unauthorized Substances Tax Account pursuant to N.C. Gen. Stat. § 105-113.113 to allocate and refund all monies collected under the Drug Tax.

5. Upon information and belief, Defendant Richard W. Riddle is a resident of Wake County, North Carolina, and is Director of the Controlled Substances Tax Division (Authorized or Unauthorized) of the North Carolina Department of Revenue in Raleigh, Wake County, North Carolina. In his official capacity, Defendant Riddle is also responsible for collecting and enforcing the Drug Tax, is responsible for the conduct and actions of the employees of the Controlled Substances Tax Division of the North Carolina Department of Revenue, and is capable of being sued in this action pursuant to N.C. Gen. Stat. § 105-267 and other applicable statutes and law.

6. Upon information and belief, Defendant North Carolina Department of State Treasurer is an agency or department of the State of North Carolina, is responsible for maintaining and controlling funds generated by the Defendant North Carolina Department of Revenue, is legally responsible for the actions and conduct of its employees of the North Carolina Department of State Treasurer, is located in Raleigh, Wake County, North Carolina, and is capable of being sued in this action pursuant to N.C.

Gen. Stat. § 105-267 and other applicable statutes and law. Defendant North Carolina Department of State Treasurer is, and would be, responsible for issuing refunds to taxpayers of taxes paid by such taxpayers from the enforcement and collection of the illegal and/or unconstitutional Drug Tax.

7. Upon information and belief, Defendant Harlan E. Boyles is a resident of Wake County, North Carolina, and is Treasurer of the North Carolina Department of State Treasurer in Raleigh, Wake County, North Carolina. In his official capacity, Defendant Boyles is responsible for having custody and maintaining and controlling funds generated by the Defendant North Carolina Department of Revenue, is responsible for the conduct and actions of the employees of the North Carolina Department of State Treasurer, and is capable of being sued in this action pursuant to N.C. Gen. Stat. § 105-267 and other applicable statutes and law. Defendant Boyles is, and would be, responsible for issuing refunds to taxpayers of taxes paid by such taxpayers from the enforcement and collection of the illegal and/or unconstitutional Drug Tax.

FACTS

8. In 1989, the North Carolina General Assembly enacted into law the Drug Tax codified at N.C. Gen. Stat. §§ 105-113.105 et seq. The Drug Tax has been actively and aggressively enforced by Defendants since its enactment.

9. The Drug Tax imposes a special excise tax on "dealers," as that term is defined under the Drug Tax, who illegally possess a sufficient quantity of a "controlled substance," as that term is defined under the Drug Tax and/or North Carolina criminal law.

10. The Drug Tax requires drug dealers to submit a form reporting their illegal possession and to pay the tax. In return, dealers are supposed to receive stamps to affix to the drugs before they are resold.

11. Payment of the Drug Tax does not make possession or resale of illegal drugs legal.

12. Upon information and belief, no drug dealer as defined under the Drug Tax has ever filed a reporting form and voluntarily paid the Drug Tax.

13. Defendant North Carolina Department of Revenue often assigned responsibility for collection of the Drug Tax to Revenue Enforcement Officers in the Controlled Substance Tax Division of the North Carolina Department of Revenue.

14. North Carolina's Drug Tax has enough punitive features that its nature is that of a criminal penalty, not a civil tax, and therefore the Drug Tax is a criminal penalty as determined in Lynn v. West, 134 F.3d 582 (4th Cir. 1998).

15. Because the Drug Tax is in reality a criminal penalty, its enforcement must conform to the constitutional safeguards that accompany criminal proceedings. Defendants did not provide any of the constitutional safeguards that accompany criminal proceedings in its enforcement, assessment, and/or collection of the Drug Tax as heretofore or hereafter alleged.

16. Enforcing a criminal punishment in a civil proceeding is incompatible with the important constitutional distinctions between civil and criminal procedure.

17. Upon information and belief, Defendants have been the most aggressive of the states in enforcing its tax on illegal drugs. In 1993, for example, North Carolina collected over six million dollars ($6,000,000), more than ten times as much money as the next highest state, Kansas.

18. On or about December 8, 1995, law enforcement officers seized marijuana at the residence of Plaintiff Joan Gore Milligan.

19. On September 23, 1996 Defendant North Carolina Department of Revenue assessed a $12,252.95 total tax liability (representing unpaid taxes, penalties, and interest) against Plaintiff Joan Gore Milligan (hereinafter "Milligan" or "Plaintiff") under the Drug Tax. This Drug Tax assessment (hereinafter "Drug Tax assessment") was based upon a taxable quantity of 2227 grams of marijuana.

20. With regard to the same marijuana which was the subject of the Drug Tax assessment mentioned above in paragraph 19, Milligan was also arrested for possession with intent to manufacture, sell or deliver marijuana; maintaining a place to keep controlled substances; and maintaining a vehicle to keep controlled substances.

21. On October 21, 1996, Milligan filed a timely objection challenging the constitutionality of the Drug Tax assessment upon her.

22. On March 4, 1998, Milligan paid $8,000 as full payment on the Drug Tax assessment.

23. On March 26, 1998, Milligan timely and duly sent a written protest and demand (hereinafter "protest and demand") to Defendant Muriel K. Offerman, Secretary of the North Carolina Department of Revenue, for a refund of the $8,000 tax paid on March 4, 1998 pursuant to the Drug Tax assessment. This protest and demand cited the unconstitutionality of the Drug Tax, and was sent pursuant to, and fully complied with, N.C. Gen. Stat. § 105-267.

24. On or about April 8, 1998, Defendant Muriel K. Offerman, by and through Defendant Richard W. Riddle, responded to Milligan's protest and demand and indicated that no refund of the Drug Tax

assessment would be made pending the appeal of Lynn v. West, 134 F.3d 582 (4th Cir. 1998).

25. This cause of action is brought to recover monies rightfully belonging to Plaintiff, individually and to others similarly situated, which monies have been unlawfully collected by Defendant North Carolina Department of Revenue and paid into the State treasury and/or the State Unauthorized Substances Tax Account pursuant to N.C. Gen. Stat. § 105-113.113.

26. Plaintiff has been required to pay taxes on the Drug Tax assessment as a result of error, misinterpretation of law, invalid or unconstitutional acts, or otherwise, as herein alleged.

27. Defendants' failure to refund the taxes which Plaintiff paid on the Drug Tax assessment is wrongful and Plaintiff, individually and on behalf of all others similarly situated, are entitled to recover from Defendants all taxes paid on all assessments of the Drug Tax, plus interest and any and all applicable penalties and other assessments.

ALLEGATIONS RELATING TO PROPOSED CLASS

28. Plaintiff re-alleges the allegations contained in paragraphs 1 through 27 and incorporates the same by reference as if fully set out herein.

29. Those persons similarly situated as Plaintiff are persons who were arrested for drug crimes, were assessed a tax under the Drug Tax, and made payments under the Drug Tax.

30. This action is properly certifiable as a class action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Rule 23.

31. Plaintiff brings this action individually on behalf of herself and all other individuals similarly situated as herein alleged, including individuals who were

assessed and paid the Drug Tax but who did not file a demand for refund. The class which Plaintiff proposes to represent is composed of the following individuals:

> All individuals who were assessed and paid the Drug Tax.

32. The questions of law and fact herein are common to Plaintiff and all members of the proposed class.
33. The claims of the representative named Plaintiff are typical of the claims of unnamed members of the proposed class which Plaintiff seeks to represent.
34. The common relief sought by the named Plaintiff is effective and appropriate to the entire class adjudication of common questions of law, and proof of the common questions of law and fact will be dispositive of the rights of each and every member of the proposed class.
35. The named Plaintiff will fairly and adequately represent and protect the interests of the members of the class she proposes to represent and her counsel is experienced in the prosecution of complex litigation and in litigation of constitutional and other claims.
36. Defendants have acted and refused to act on grounds generally applicable to the entire proposed class by their enforcement of the unlawful and unconstitutional Drug Tax.
37. A class action is superior to other available methods for the fair and efficient adjudication of this controversy in that a class action can be easily managed and will permit the adjudication of numerous individual claims in one forum and will conserve the resources of all parties and the Court. Many of the proposed class members may not be aware of their rights against Defendants and many are believed to be in a financial position which makes

it difficult, if not impossible, for them to assert their rights individually. The desirability of concentrating controversy in a single forum outweighs any interest of individual members of the proposed class in individually controlling the prosecution of his or her claims.

FIRST CLAIM FOR RELIEF
(STATE CONSTITUTIONAL CLAIMS)

38. Plaintiff re-alleges the allegations contained in paragraphs 1 through 37 and incorporates the same by reference as if fully set out herein.

39. That the Drug Tax and the actions of Defendants alleged herein are invalid, void, and unconstitutional in that they violate:

A. N.C. Const. art. I., Sec. 19 for the reason that they amount to a taking of property without just compensation, are arbitrary and capricious, and confiscatory, are in violation of due process, equal protection, are in violation of rights afforded to defendants accused of crimes in North Carolina, and violate the state constitutional safeguards that accompany criminal proceedings;

B. N.C. Const. art. I, Sec. 22 for the reason that they do not afford the proper modes of prosecution for individuals charged with crimes, and violate the state constitutional safeguards that accompany criminal proceedings;

C. N.C. Const. art. I, Sec. 23 for the reason that they violate rights afforded to individuals accused of crimes in North Carolina, and violate the state constitutional safeguards that accompany criminal proceedings;

D. N.C. Const. art. I, Sec. 24 for the reason that they violate rights afforded to individuals accused of crimes in North Carolina, and violate the state constitutional safeguards that accompany criminal proceedings;

E. N.C. Const. art. I, Sec. 27 for the reason that they are in violation of the prohibition against the imposition of excessive fines or an unusual punishment;

F. N.C. Const. art. I, Sec. 6 for the reason that they violate the proper delegation of power between the executive branch of state government, legislative branch of state government, and judicial branch of state government;

G. N.C. Const. art. I, Sec. 5 for the reason that they violate the United States Constitution as hereinafter mentioned and thereby violate the North Carolina Constitution.

SECOND CLAIM FOR RELIEF
(FEDERAL CONSTITUTIONAL CLAIMS)

40. Plaintiff re-alleges the allegations contained in paragraphs 1 through 39 and incorporates the same by reference as if fully set out herein.

41. That the Drug Tax and the actions of Defendants alleged herein are invalid and void because they violate the United States Constitution in that they amount to a taking of property without just compensation, are arbitrary and capricious, and confiscatory, are in violation of due process, equal protection, impose excessive fines or an unusual punishment, are in violation of rights afforded to defendants accused of crimes, and violate the federal constitutional safeguards that accompany criminal proceedings.

THIRD CLAIM FOR RELIEF
(CLAIMS OF ALL INDIVIDUALS WHO PAID THE DRUG TAX FOR RETURN OF ANY AND ALL MONIES HERETOFORE OR HEREAFTER ILLEGALLY COLLECTED)

42. Plaintiff re-alleges the allegations contained in paragraphs 1 through 41 and incorporates the same by reference as if fully set out herein.

43. This action is brought to recover any and all monies, rightfully belonging to Plaintiff and all others similarly situated, being the class she seeks to represent, which monies have been unlawfully collected and are being unlawfully collected by the Defendants pursuant to the Drug Tax and since its enactment into law. The Court has jurisdiction to determine this matter, and that all conditions precedent to this Court's jurisdiction to order the refund of such taxes or order other relief have been performed.

44. Plaintiffs institute the present action challenging Defendants' past, present, and/or future taxation under the Drug Tax since its enactment. The past, current, or future taxation under the Drug Tax violated, violates, and/or will violate both the federal and state constitutions as alleged herein.

FOURTH CLAIM FOR RELIEF
(DECLARATORY JUDGMENT AND WRIT OF MANDAMUS)

45. Plaintiff re-alleges the allegations contained in paragraphs 1 through 44 and incorporates the same by reference as if fully set out herein.

46. As a result of the foregoing, Plaintiff and all others similarly situated are entitled to a declaratory judgment determining: that the Drug Tax and/or the

actions of Defendants violate the North Carolina and/or United States Constitutions; that Plaintiff and all others similarly situated are entitled to a full refund of any and all monies paid pursuant to the Drug Tax; and for such other and further relief Plaintiffs may have pursuant to the provisions of the North Carolina Declaratory Judgment Act.

47. Additionally, in view of the foregoing, Plaintiff and all others similarly situated are entitled to a Writ of Mandamus requiring Defendants to comply with the law and refund any and all monies to Plaintiff and all others similarly situated which were paid pursuant to the Drug Tax.

WHEREFORE, Plaintiff prays on her behalf and on behalf of all others similarly situated as follows:

1. For certification as a class pursuant to N.C. Gen. Stat. § 1A-1, Rule 23.
2. A Declaration that the Drug Tax and/or the actions of Defendants alleged herein violate the North Carolina Constitution and recovery therefor;
3. A Declaration that the Drug Tax and/or the actions of Defendants alleged herein violate the United States Constitution and recovery therefor;
4. A Declaratory Judgment, pursuant to N.C. Gen. Stat. § 1-253 et seq., that the Drug Tax and the actions of Defendants are void, invalid, and have no force and effect as herein alleged and recovery therefor;
5. A Writ of Mandamus requiring Defendants or anyone acting by, through, under, or in concert therewith, to repay and refund any and all monies paid pursuant to the Drug Tax;

6. A full return to Plaintiff and all others similarly situated of any and all monies heretofore or hereafter illegally collected or paid pursuant to the Drug Tax as alleged herein and interest as by law provided;
7. Such attorneys' fees as the law may allow;
8. That the costs of this action be taxed against Defendants;
9. For such other relief as may be justified.

This the _____ day of July, 1998.

WYATT EARLY HARRIS & WHEELER, L.L.P.
Attorneys for Plaintiffs

By:/s/_____
SCOTT F. WYATT (State Bar No. 18754)
For the Firm

By:/s/_____
WILLIAM E. WHEELER (State Bar No. 6917)
For the Firm

By:/s/_____
STANLEY F. HAMMER (State Bar No. 12421)

OF COUNSEL:

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FILE NO. 98CvS 7891

NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY

****

JOAN GORE MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,
Plaintiffs,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
Of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
Of the State of North Carolina,
Defendants.

Entered: September 23, 1998

****

AMENDMENT TO COMPLAINT
AS OF RIGHT

COMES NOW Plaintiff, Joan Gore Milligan, Individually and for the benefit and on behalf of all others

similarly situated, by and through the undersigned counsel and pursuant to Rule 15(a) amends as of right and before services of any responsive pleading by Defendants, her Complaint as follows:

1. Plaintiff's initial Complaint is incorporated herein by reference as if fully set forth herein.

2. Plaintiffs adds the following paragraph to her complaint, following Paragraph 39:

   39.1 Upon information and belief, Defendants State of North Carolina and the North Carolina Department of Revenue and all of the defendants have ceased efforts at collecting the drug tax since the decision in *Lynn v. West*, 134 F. 3d 582 (4th Cir. 1998), Petition for Certiorari pending, U.S. Supreme Court, No. 97-1829, and are therefor estopped to deny that the drug tax is unconstitutional.

This the 3rd day of September, 1998.

WYATT EARLY HARRIS & WHEELER, L.L.P.
Attorneys for Plaintiffs

By:/s/
SCOTT F. WYATT (State Bar No. 18754)
For the Firm

By:/s/
WILLIAM E. WHEELER (State Bar No. 6917)
For the Firm

By:/s/_____
STANLEY F. HAMMER (State Bar No. 421)

OF COUNSEL:

WYATT EARLY HARRIS & WHEELER, L.L.P.
Post Office Drawer 2086
High Point, NC 27261-2086
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Facsimile: 336/884-1102

N.C. Gen. Stat. § 105-113.105 (1996)

Purpose.

The purpose of this Article is to levy an excise tax to generate revenue for State and local law enforcement agencies and for the General Fund. Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance.

(1989, c. 772, s. 1; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.106 (1996)

Definitions.

The following definitions apply in this Article:

(1) Controlled Substance. -- Defined in G.S. 90-87.

(2) Repealed by Session Laws 1995, c. 340, s. 1, effective October 1, 1995.

(3) Dealer. -- A person who actually or constructively possesses more than 42.5 grams of marijuana, seven or more grams of any other controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance that is not sold by weight.

(4) Repealed by Session Laws 1995, c. 340, s. 1, effective October 1, 1995.

(4a) Reserved.

(4b) Reserved.

(4c) Low-street-value drug. -- Any of the following controlled substances:

a. An anabolic steroid as defined in G.S. 90-91(k).

b. A depressant described in G.S. 90-89(d), 90-90(d), 90-91(b), or 90- 92(a).

c. A hallucinogenic substance described in G.S. 90-89(c) or G.S. 90-90(e).

d. A stimulant described in G.S. 90-89(e), 90-90(c), 90-91(j), 90-92(d), or 90-93(a)3.

e. A controlled substance described in G.S. 90-91(c), (d), or (e), 90- 92(c), (e), or (f), or 90-93(a)1.

(5) Repealed by Session Laws 1995, c. 340, s. 1, effective October 1, 1995.

(6) Marijuana. -- All parts of the plant of the genus Cannabis, whether growing or not; the seeds of this

plant; the resin extracted from any part of this plant; and every compound, salt, derivative, mixture, or preparation of this plant, its seeds, or its resin.

(7) Person. -- Defined in G.S. 105-228.90.

(8) Secretary. -- Defined in G.S. 105-228.90.

(1989, c. 772, s. 1; 1993, c. 354, s. 10; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.107 (1996)

Excise tax on controlled substances.

An excise tax is levied on controlled substances possessed, either actually or constructively, by dealers at the following rates:

(1) At the rate of forty cents (40 cents) for each gram, or fraction thereof, of harvested marijuana stems and stalks that have been separated from and are not mixed with any other parts of the marijuana plant.

(1a) At the rate of three dollars and fifty cents ($3.50) for each gram, or fraction thereof, of marijuana, other than separated stems and stalks taxed under subdivision (1) of this section.

(2) At the rate of two hundred dollars ($200.00) for each gram, or fraction thereof, of any other controlled substance that is sold by weight.

(2a) At the rate of fifty dollars ($50.00) for each 10 dosage units, or fraction thereof, of any low-street-value drug that is not sold by weight.

(3) At the rate of four hundred dollars ($400.00) for each 10 dosage units, or fraction thereof, of any other controlled substance that is not sold by weight.

A quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers.

(1989, c. 772, s. 1; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.107A (1996)

Exemptions.

(a) Authorized Possession. -- The tax levied in this Article does not apply to a controlled substance in the possession of a dealer who is authorized by law to possess the substance. This exemption applies only during the time the dealer's possession of the substance is authorized by law.

(b) Certain Marijuana Parts. -- The tax levied in this Article does not apply to the following marijuana:

(1) Harvested mature marijuana stalks when separated from and not mixed with any other parts of the marijuana plant.

(2) Fiber or any other product of marijuana stalks described in subdivision (1) of this subsection, except resin extracted from the stalks.

(3) Marijuana seeds that have been sterilized and are incapable of germination.

(4) Roots of the marijuana plant.

(1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.108 (1996)

Reports; revenue stamps.

The Secretary shall issue stamps to affix to controlled substances to indicate payment of the tax required by this Article. Dealers shall report the taxes payable under this Article at the time and on the form prescribed by the Secretary. Dealers are not required to give their name, address, social security number, or other identifying information on the form. Upon payment of the tax, the Secretary shall issue stamps in an amount equal to the amount of the tax paid. Taxes may be paid and stamps may be issued either by mail or in person.

(1989, c. 772, s. 1; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.109 (1996)

When tax payable.

The tax imposed by this Article is payable by any dealer who actually or constructively possesses a controlled substance in this State upon which the tax has not been paid, as evidenced by a stamp. The tax is payable within 48 hours after the dealer acquires actual or constructive possession of a non-tax- paid controlled substance, exclusive of Saturdays, Sundays, and legal holidays of this State, in which case the tax is payable on the next working day. Upon payment of the tax, the dealer shall permanently affix the appropriate stamps to the controlled substance. Once the tax due on a controlled substance has been paid, no additional tax is due under this Article even though the controlled substance may be handled by other dealers.

(1989, c. 772, s. 1; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.110 (1996)

Repealed by Session Laws 1995, c. 340, s. 1, effective October 1, 1995.

N.C. Gen. Stat. § 105-113.110A

Interest and penalty.

The tax due under this Article shall bear interest at the rate established pursuant to G.S. 105-241.1(i) from the date due until paid. In addition, a dealer who neglects, fails, or refuses to pay the tax due under this Article is liable for a penalty equal to fifty percent (50%) of the tax.

(1989 (Reg. Sess., 1990), c. 814, s. 7; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.111 (1996)

Assessments.

Notwithstanding any other provision of law, an assessment against a dealer who possesses a controlled substance to which a stamp has not been affixed as required by this Article shall be made as provided in this section. The Secretary shall assess a tax, applicable penalties, and interest based on personal knowledge or information available to the Secretary. The Secretary shall notify the dealer in writing of the amount of the tax, penalty, and interest due, and demand its immediate payment. The notice and demand shall be either mailed to the dealer at the dealer's last known address or served on the dealer in person. If the dealer does not pay the tax, penalty, and interest immediately upon receipt of the notice and demand, the Secretary shall collect the tax, penalty, and interest pursuant to the procedure set forth in G.S. 105- 241.1(g) for jeopardy assessments or the procedure set forth in G.S. 105-242, including causing execution to be issued immediately against the personal property of the dealer, unless the dealer files with the Secretary a bond in the amount of the asserted liability for the tax, penalty, and interest. The Secretary shall use all means available to collect the tax, penalty, and interest from any property in which the dealer has a legal, equitable, or beneficial interest. The dealer may seek review of the assessment as provided in Article 9 of this Chapter.

(1989, c. 772, s. 1; 1989 (Reg. Sess., 1990), c. 1039, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 20(d); 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.112 (1996)

Confidentiality of information.

Notwithstanding any other provision of law, information obtained pursuant to this Article is confidential and may not be disclosed or, unless independently obtained, used in a criminal prosecution other than a prosecution for a violation of this Article. Stamps issued pursuant to this Article may not be used in a criminal prosecution other than a prosecution for a violation of this Article. A person who discloses information obtained pursuant to this Article is guilty of a Class 1 misdemeanor. This section does not prohibit the Secretary from publishing statistics that do not disclose the identity of dealers or the contents of particular returns or reports.

(1989, c. 772, s. 1; 1993, c. 539, s. 702; 1994, Ex. Sess., c. 24, s. 14(c).)

N.C. Gen. Stat. § 105-113.113 (1996)

Use of tax proceeds.

(a) Special Account. -- The Secretary shall credit the proceeds of the tax levied by this Article to a special nonreverting account, to be called the State Controlled Substances Tax Account, until the tax proceeds are unencumbered. The Secretary shall remit the unencumbered tax proceeds as provided in this section on a quarterly or more frequent basis. Tax proceeds are unencumbered when either of the following occurs:

(1) The tax has been fully paid and the taxpayer has no current right under G.S. 105-267 to seek a refund.

(2) The taxpayer has been notified of the final assessment of the tax under G.S. 105-241.1 and has neither fully paid nor timely contested the tax under G.S. 105-241.1 through G.S. 105-241.4 or G.S. 105-267.

(b) Distribution. -- The Secretary shall remit seventy-five percent (75%) of the part of the unencumbered tax proceeds that was collected by assessment to the State or local law enforcement agency that conducted the investigation of a dealer that led to the assessment. If more than one State or local law enforcement agency conducted the investigation, the Secretary shall determine the equitable share for each agency based on the contribution each agency made to the investigation. The Secretary shall credit the remaining unencumbered tax proceeds to the General Fund.

(c) Refunds. -- The refund of a tax that has already been distributed shall be drawn initially from the State

Controlled Substances Tax Account. The amount of refunded taxes that had been distributed to a law enforcement agency under this section and any interest shall be subtracted from succeeding distributions from the Account to that law enforcement agency. The amount of refunded taxes that had been credited to the General Fund under this section and any interest shall be subtracted from succeeding credits to the General Fund from the Account.

(1991 (Reg. Sess., 1992), c. 900, s. 20(c); 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-267 (1996)

Taxes to be paid; suits for recovery of taxes.

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person has a valid defense to the enforcement of the collection of a tax, the person shall pay the tax to the proper officer, and that payment shall be without prejudice to any defense of rights the person may have regarding the tax. At any time within the applicable protest period, the taxpayer may demand a refund of the tax paid in writing from the Secretary and if the tax is not refunded within 90 days thereafter, may sue the Secretary in the courts of the State for the amount demanded. The protest period for all other taxes is one year after payment.

The suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it is determined that all or part of the tax was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefore with interest, and the judgment shall be collected as in other cases. The amount of taxes for which judgment is rendered in such an action shall be refunded by the State. G.S. 105-241.2 provides an alternate procedure for a taxpayer to contest a tax and is not in conflict with or superseded by this section.

(1939, c.158, s.936; 1955, c.1350, s.15; 1957, c.1340, s.10; 1977, c. 946, s.1; 1996, 2nd Ex. Sess., c.14, s.10.1.)

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEVAN ANDERSON,
Defendant-Appellant.

No. 98-4658

Argued: April 6, 2000
Decided: May 15, 2000
Entered: May 15, 2000

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Terrence W. Boyle, Chief District Judge. (CR-97-34-BO- 1)

Before WILKINSON, Chief Judge, MOTZ, Circuit Judge, and HAMILTON, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Douglas Everette Kingsbery, THARRINGTON SMITH, L.L.P., Raleigh, North Carolina, for Appellant. John Howarth Bennett, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. F. Hill Allen,

THARRINGTON SMITH, L.L.P., Raleigh, North Carolina, for Appellant. Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Jevan Anderson was convicted under 21 U.S.C. s 846 for conspiracy to distribute or possess with intent to distribute crack cocaine. On appeal, Anderson contends that the government presented insufficient evidence to support his conviction. Finding no merit to this contention, we affirm. Anderson also challenges his sentencing on a number of grounds. For the reasons set forth below, we affirm his sentence in part and vacate in part. We remand for resentencing under the applicable sentencing guidelines.

I.

In 1997, the Drug Enforcement Administration Mobile Enforcement Team conducted an investigation in Kinston, North Carolina. Jevan Anderson was one of the targets of this investigation. In November1997, Anderson was arrested and charged under 21 U.S.C. § 846 for conspiracy to distribute or possess with intent to distribute crack cocaine. Trial commenced on August 24, 1998. Government cooperating witnesses Kenya Jackson, Odell Caracter, and Carlos Ramos all testified to selling substantial amounts of crack cocaine to Anderson on multiple occasions. Jackson and Caracter also spoke of the close relations between Anderson and Sheridon Outlaw with respect to the

drug trade. A paid government informant likewise testified. He recalled purchasing crack cocaine from Anderson on two separate occasions. Another of the government's witnesses, Shontelle Poole, also testified to making two crack cocaine purchases from Anderson. In addition, Poole stated that Anderson sold crack cocaine "every day."

DEA Special Agent Eric Kolbinsky then testified about the DEA searches of the house where Anderson sold drugs and the house where Anderson resided. While the DEA agents found no drugs, they did find a set of electronic scales. Kolbinsky testified that such devices are commonly used for weighing drugs. In Anderson's bedroom, the DEA discovered $11,825 in cash. Some of the currency was bundled in $1000 amounts. Kolbinsky testified that such bundling is very common in the narcotics trade. Anderson offered no evidence and filed a motion to dismiss. The district court denied his motion. The jury then found Anderson guilty on the single conspiracy count.

On January 13, 1999, the district court held Anderson's sentencing hearing. The court found that Anderson was responsible for over 1,176 grams of crack cocaine plus a specified amount of powder cocaine which yielded a base offense level of 36. When combined with Anderson's criminal history category of IV, a guidelines sentencing range of 262 to 327 months resulted.

The court then addressed the government's request to enhance Anderson's sentence to a mandatory term of life imprisonment pursuant to 21 U.S.C. s 841(b)(1)(A). The court concluded that Anderson had been convicted of two prior drug felonies, as required by s 841(b)(1)(A). As a result, the court sentenced Anderson to life in prison. Anderson now appeals both his conviction and sentencing. We address his claims in turn.

II.

Anderson argues that the evidence submitted by the government at trial was insufficient to support his conviction under § 846. Anderson specifically claims that the government did not prove that he was conspiring with others in furtherance of his drug trade. See United States v. Burgos, 94 F.3d 849, 858 (4th Cir.1996) (en banc) ("[I]n addition to proving the existence of a conspiracy beyond a reasonable doubt, the Government must also prove a defendant's connection to the conspiracy beyond a reasonable doubt.").

We disagree. "When assessing the sufficiency of the evidence of a criminal conviction on direct review, '[t]he verdict of [the] jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' "

United States v. Mitchell, No. 99-4008, 2000 WL 309298, at *5 (4th Cir.Mar. 27, 2000) (quoting Glasser v. United States, 315 U.S. 60, 80 (1942)). Viewing the evidence in the light most favorable to the government, we conclude that there is substantial evidence that Anderson conspired with others to distribute crack cocaine.

Kenya Jackson and Odell Caracter both testified that Anderson acted in concert with Sheridon Outlaw. Jackson testified that the two men were frequently seen together and that Jackson jointly sold them drugs. Furthermore, Jackson described Outlaw as a "partner" of Anderson's. And Caracter recalled that Anderson and Outlaw were always together when he sold drugs to Outlaw.

Kenya Jackson also testified that on three occasions he sold Anderson a total of 482 grams of crack cocaine. See United States v. Mills, 995 F.2d 480, 485 n.1 (4th Cir.1993) ("[W]e believe evidence of a buy-sell transaction, when coupled with a substantial quantity of drugs, would support a reasonable inference that the parties were coconspirators."). Odell Caracter and Carlos Ramos testified that they met

Anderson through Jackson. Caracter sold Anderson over 510 grams of crack cocaine, and Ramos sold Anderson over 170 grams. The government's evidence also showed that Anderson used the services of Shontelle Poole in furtherance of his drug business. For example, Poole took Anderson to the Washington, D.C., area to purchase drugs. For her services, Poole was compensated with crack cocaine. The testimony of all of these witnesses provides substantial evidence that Anderson did in fact conspire with others to distribute crack cocaine.

III.

A. With respect to sentencing, Anderson first contends that the district court clearly erred in calculating the amount of drugs attributable to him in determining his base offense level under the guidelines. Anderson initially asserts that the government did not adequately prove that the drugs referenced in Anderson's presentence report were part of the s 846 conspiracy. The government bears the burden of proving that drugs are attributable to a defendant by a preponderance of the evidence, see United States v. Lamarr, 75 F.3d 964, 972 (4th Cir.1996), and evidence introduced at trial can be used to satisfy this burden, see United States v. Williams, 986 F.2d 86, 90-91 (4th Cir.1993). The government introduced evidence at trial showing that Jackson, Caracter. and Ramos all sold substantial amounts of crack cocaine to Anderson--an amount totaling over 1,162 grams. The government's evidence also showed that Jackson introduced Anderson to both Caracter and Ramos. Based on this evidence, we cannot conclude that the district court clearly erred by concluding that these amounts of drugs were connected to a single conspiracy.

Anderson also contends that the district court clearly erred in attributing to him the 1,000 grams of the so-called "fish scale" cocaine. The error, if any, is clearly harmless. As Anderson concedes, the district court did not count the

"fish scale" cocaine as crack cocaine, but rather as powder cocaine. Thus, the district court's crack cocaine total of 1,176.525 grams is unaffected. This quantity of crack cocaine is more than enough for base offense level 36 to apply to Anderson. See U.S. Sentencing Guidelines Manual § 2D1.1(c)(2)(1998) (Level 36 applies to offenses involving at least 500 grams but less than 1,500 grams of crack cocaine.).

B. Anderson next contends that the district court erred by applying the 21U.S.C.§841(b)(1)(A) life imprison-ment sentencing enhancement to him. Section 841(b)(1)(A) provides, "If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release...."

Anderson initially contends that because § 841(b)(1)(A) does not explicitly refer to § 846, this enhancement cannot apply to his § 846 conviction. While Anderson is correct in noting that s 841(b)(1)(A) does not explicitly list s 846, s 846 itself states, "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." (emphasis added). In this case, the object of Anderson's conspiracy was violating § 841, which makes it illegal to distribute crack cocaine. Because §846 adopts the §841 penalty structure in full, the §841(b)(1)(A) life imprisonment enhancement can be applied to Anderson's §846 convic-tion.

Anderson contends, however, that one of the two prior felony drug convictions relied on by the government cannot count as a predicate offense under §841 (b)(1)(A). See 21 U.S.C. §851(c). He argues that his 1996 North Carolina felony drug conviction was obtained in violation of the Constitution's prohibition against double jeopardy.

Anderson notes that prior to his North Carolina conviction, the state assessed and collected a portion of its drug tax against him with respect to the very drugs at issue in his conviction--a fact the government has not disputed. See N.C. Gen.Stat. §§105-113.105 to 105-113.113 (1999). Anderson then notes that this circuit has held North Carolina's drug tax to constitute a criminal penalty for purposes of the Double Jeopardy Clause. See Lynn v. West, 134 F.3d 582, 588-93 (4th Cir.), cert. denied, 119 S.Ct. 47 (1998). As a result of the drug tax being a criminal penalty, Anderson argues, his subsequent state conviction violated the Double Jeopardy Clause.

The government argues that Anderson waived this claim. While we agree with the government that a double jeopardy claim can, at least in some circumstances, be waived, see United States v. Broce, 488 U.S. 563 (1989), we cannot conclude that there has been a waiver in this case. Anderson cannot be said to have waived his double jeopardy claim as it simply would have been futile for Anderson to have raised this claim in state court. Prior to Anderson's conviction on the drug charge, North Carolina courts had determined that the North Carolina drug tax was not a criminal penalty for purposes of the Double Jeopardy Clause. See State v. Ballenger, 472 S.E.2d 572, 572-75 (N.C.Ct.App.1996), aff'd per curiam, 481 S.E.2d 84, cert. denied, 522 U.S. 817 (1997); State v. Creason, 473 S.E.2d 771, 772 (N.C.Ct.App.1996), aff'd per curiam, 484 S.E.2d 525 (1997). A subsequent North Carolina case even pointed out that state courts were not bound by the Fourth Circuit Lynn v. West decision, but rather were bound by the state court pronouncements on the matter. See State v. Adams, 513 S.E.2d 588, 589 (N.C.Ct.App.1999).

In this forum, to say the least, Lynn v. West is binding. And pursuant to Lynn v. West, Anderson's subsequent North Carolina drug conviction constituted double jeopar-dy. As a result, the conviction cannot be used as a predicate offense under s 841(b)(1)(A). We thus

vacate Anderson's sentence and remand for resentencing under the applicable sentencing guidelines.

IV.

For the foregoing reasons, we affirm Anderson's conviction and affirm his sentence in part and vacate in part. We remand for resentencing under the applicable sentencing guidelines.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

COURT, U.S.
FILED
JUL 5 2000
OFFICE OF THE CLERK

(3)

No. 99-1938

In the
Supreme Court of the United States

JOAN GORE MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,

Petitioner,

v.

STATE OF NORTH CAROLINA, *et al,*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF IN OPPOSITION

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July 5, 2000

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QUESTIONS PRESENTED

1. **WHETHER ANY ALLEGED CONFLICT BETWEEN THE DECISIONS OF THE NORTH CAROLINA APPELLATE COURTS AND THIS COURT'S DECISION IN *DEPARTMENT OF REVENUE OF MONTANA V. KURTH RANCH*, 511 U.S. 767 (1994), JUSTIFY GRANT OF THIS COURT'S WRIT OF CERTIORARI IN THIS CIVIL ACTION FOR A TAX REFUND.**

2. **WHETHER AN ALLEGED CONFLICT BETWEEN NORTH CAROLINA APPELLATE COURT DECISIONS AND THOSE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT CONCERNING DRUG TAXES JUSTIFY GRANT OF THIS COURT'S WRIT OF CERTIORARI IN THIS CIVIL ACTION FOR A TAX REFUND.**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

REASONS FOR DENYING THE WRIT 4

I. THIS COURT SHOULD NOT GRANT CERTIORARI IN THIS CIVIL ACTION FOR A TAX REFUND BASED ON ANY ALLEGED CONFLICT BETWEEN THE DECISIONS OF THE NORTH CAROLINA APPELLATE COURTS AND THIS COURT'S DECISION IN *DEPARTMENT OF REVENUE OF MONTANA V. KURTH RANCH*, 511 U.S. 767 (1994). 5

II. THIS COURT SHOULD NOT GRANT CERTIORARI BASED ON THE ALLEGED CONFLICT BETWEEN THE NORTH CAROLINA APPELLATE COURT DECISIONS AND THOSE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT 11

A. THIS CASE AND *LYNN V. WEST* DO NOT PRESENT A CONFLICT SUCH THAT THIS COURT SHOULD GRANT ITS WRIT OF CERTIORARI. 12

B. NORTH CAROLINA WAS NOT REQUIRED TO FOLLOW THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN *LYNN* 14

CONCLUSION 16

APPENDIX

TABLE OF AUTHORITIES

CASES

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 15

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 15

Brunner v. Collection Div. of the Utah State Tax Comm'n, 945 P.2d 687 (Utah 1997) 11

Bryant v. State, 660 N.E.2d 290 (Ind. 1995), *cert. denied*, 519 U.S. 926 (1996) 10

Commissioner of Revenue v. Mullins, 702 N.E.2d 1 (Mass. 1998) 11

Commonwealth v. Bird, 979 S.W.2d 915 (Ky. 1998), *cert. denied*, 526 U.S. 1145 (1999) 10

Covelli v. Commissioner of Revenue Servs. (Covelli I), 668 A.2d 699 (Conn. 1995), *vacated and remanded sub nom. Covelli v. Crystal*, 518 U.S. 1031 (for further consideration in light of *United States v. Ursery*, 518 U.S. 267 (1996)), *aff'd per curiam on reconsideration, Covelli v. Commissioner of Revenue Servs. (Covelli II)*, 683 A.2d 737 (Conn. 1996), *cert. denied*,

Covelli v. Crystal, 520 U.S. 1174 (1997) 9

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994) ..... *passim*

Desimone v. State, 904 P.2d 1 (Nev. 1995), *vacated and remanded*, 518 U.S.1030 (1996), *affirmed on remand*, 996 P.2d 405 (Nev. 2000) .. 10

Ex parte Ward, 964 S.W.2d 617 (Tex. Crim. App.), *cert. denied*, 525 U.S. 823 (1998) 10

Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) 3

Hill v. State, 898 P.2d 155 (Okla. Crim. App. 1995) 10

Lockhart v. Fretwell, 506 U.S. 364 (1993) 15

Lynn v. West, 134 F.3d 582 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998) 4,11,13,14

Marbury v. Madison, 1 Cranch 137 (1803) 14

McMullin v. South Carolina Dep't of Revenue & Taxation, 469 S.E.2d 600, *reh'g denied* (S.C. 1996) 10

Milner v. State, 658 So. 2d 500 (Ala. Civ. App. 1994), *cert. denied* (Ala. 1995) 9

Padavich v. Thalacker, 162 F.3d 521 (8th Cir. 1998),
cert. denied, 527 U.S. 1025 (1999) 10

People v. Maurello, 932 P.2d 851
(Colo. App. Ct. 1997) 10

State v. Adams, 513 S.E.2d 588 (N.C. Ct. App. 1999),
disc. review denied, 350 N.C. 836,
__ S.E.2d __, *cert. denied*, __ U.S. __,
120 S. Ct. 534 (1999) 4,9,13

State v. Ballenger, 472 S.E.2d 572 (N.C. Ct. App. 1996),
aff'd per curiam, 481 S.E.2d 84 (N.C.),
cert. denied, 522 U.S. 817 (1997) ..... *passim*

State v. Creason, 473 S.E.2d 771 (N.C. Ct. App.1996),
aff'd per curiam, 484 S.E.2d 525 (N.C. 1997) 9

State v. Foster, 519 S.E.2d 783 (N.C. Ct. App.),
disc. review denied, 350 N.C. 840,
__ S.E.2d __, *cert. denied*, __ U.S. __,
120 S. Ct. 534 (1999) 4,9,14

State v. Gulledge, 896 P.2d 378 (Kan. 1995) 10

State v. Lange, 531 N.W.2d 108 (Iowa 1995) 10

State v. Stubblefield, 543 N.W.2d 743 (Neb. 1996) 10

State v. Wambach, 526 S.E.2d 212 (N.C. Ct. App. 2000) . 9

State v. Woods, 524 S.E.2d 363 (N.C. Ct. App. 2000) 9

Stennett v. State, 941 S.W.2d 914 (Tex. Crim. App. 1996), *reh'g denied* (Tex. Apr. 2, 1997) 10

Wilson v. Department of Revenue, 662 N.E.2d 415 (Ill. 1996) 10

OTHER

U.S. CONST., art. VI, §2 14

N.C. GEN. STAT. § 1A-1, Rule 12(b)(6) 2

N.C. GEN. STAT. § 105-113.105, *et seq.* 1

N.C. GEN. STAT. § 105-113.107 7

N.C. GEN. STAT. § 105-113.108 8

N.C. GEN. STAT. § 105-113.109 7

N.C. GEN. STAT. § 105-113.110A 13

N.C. GEN. STAT. § 105-113.112 8

N.C. GEN. STAT. § 105-236 13

N.C. GEN. STAT. § 105-267 1,3

STATEMENT OF THE CASE

Petitioner Joan Gore Milligan ("Milligan") filed this civil action on 6 July 1998 in the Superior Court of Wake County, North Carolina, against the State of North Carolina, the North Carolina Department of Revenue, the Secretary of the Department of Revenue, the Director of the Controlled Substance Tax Division of the Department of Revenue, the North Carolina Department of State Treasurer, and the Treasurer of the State of North Carolina (collectively hereafter "defendants"). Complaint, Appendix to Petition for Writ of Certiorari (hereafter "Pet. App.") at 11a. She claimed to seek tax refunds for herself, and others similarly situated, pursuant to N.C. GEN. STAT. § 105-267. Appendix to Brief In Opposition (hereafter "App.") at 5a.[1] The taxes for which she sought refunds were collected by the Department of Revenue based on statutory provisions imposing excise taxes on controlled substances, including marijuana, in the possession of "dealers" (hereafter referred to as the "Drug Tax"). *See* N.C. GEN. STAT. §§ 105-113.105 *et seq.*, Pet. App. at 27a-38a. On 10 August 1998, all defendants[2] joined in a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to the North Carolina Rules of Civil Procedure, N.C.

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[1] The version of the statute set out in the Appendix to the Petition for Writ of Certiorari at 39a is incomplete, and thus defendants have included the relevant portion of the same statute in the Appendix to this document.

[2] Although Milligan stated in her Petition, at page 4, that the Attorney General of North Carolina acted on behalf of the Department of Revenue in successfully moving to dismiss her claim, the Attorney General in fact was acting on behalf of *all* the defendants.

GEN. STAT. § 1A-1, Rule 12(b)(6). That motion was renewed on 17 September 1998 in response to Milligan's Amended Complaint. The trial court granted defendants' motion to dismiss on 23 October 1998. Pet. App. at 9a-10a. Milligan appealed to the North Carolina Court of Appeals, and on 7 December 1999 that court filed its opinion affirming the trial court's dismissal of her claim. Pet. App. at 5a-8a. Milligan sought review by the North Carolina Supreme Court, and on 2 March 2000 that court denied her petition for discretionary review and granted defendants' motion to dismiss her appeal. Pet. App. at 1a-4a.

STATEMENT OF THE FACTS

This case is here on Milligan's Petition asking this Court to review the North Carolina Court of Appeals' decision affirming a North Carolina trial court's granting of a motion to dismiss for failure to state a claim for relief. Therefore, in considering the appropriateness of the judgment granting the motion to dismiss, the facts alleged in the Complaint must be assumed to be true. Nevertheless, defendants do not want to leave the mistaken impression that the factual allegations of the Complaint are conceded. At each stage of this proceeding, defendants have noted that they have certain defenses to Milligan's claim and certain disagreements with her allegations. Because defendants never answered the Complaint, the defenses and disagreements with Milligan's allegations have never been fully spelled out. However, defendants did file a motion for a protective order and to stay certain discovery requests made early in the litigation by Milligan. Defendants' Motion For A Stay Of Discovery And Protective Order Pursuant To Rule

26(c) Of The Rules Of Civil Procedure, App. at 7a-11a. Motion, defendants specifically noted that their defenses i "whether she in fact made a timely demand under N.C Stat. § 105-267, which is necessary to permit her to in this suit challenging the validity of the drug tax and se refunds" and "whether plaintiff has in effect waived her ri challenge the drug tax assessed against her by reach voluntary settlement of the assessment." App. at 8a. Court has previously acknowledged the requirements im by N.C. GEN. STAT. § 105-267 on challenges to tax la North Carolina. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 347 (1996).)[3] Defendants point out these circumstances s Court will not assume that defendants concede the truth o statements alleged in the Complaint. However, defendan not disagree with Milligan's Statement of the Facts whe "facts" set out therein are viewed solely as statements o

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[3] Under N.C. GEN. STAT. § 105-267, Milligan was required to a demand for refund, or "protest" the tax, within thirty (30) days of pay App. at 5a. Because the money was actually received by the Departm Revenue in 1997 and accepted as part of a settlement of three assess against both petitioner Joan Milligan and Jerry Milligan, defendants v challenge petitioner Joan Milligan's claim that she made a timely demar refund. Defendants would also challenge whether Joan Milligan is entitl seek a refund of taxes received and accepted to settle assessments against her and Jerry Milligan. Defendants would also contend that Milligan, thr the settlement of the assessments, has waived her right to challenge th under N.C. GEN. STAT. § 105-267. In other respects, as well, defenc would challenge the "facts" set out in the Complaint, such as the allegation she paid $8,000 on a single $12,252.95 assessment, Complaint, ¶¶ 19, 22, App. at 16a, when the $8,000 was actually accepted in resolution of t assessments totaling substantially more money.

allegations of the Complaint and statements of the North Carolina courts' rulings.

REASONS FOR DENYING THE WRIT

The petition should be denied because the North Carolina appellate courts' opinions that the State's Drug Tax is not a criminal penalty were not reached contrary to this Court's decision in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994). This Court has previously rejected all petitions seeking review of cases involving the North Carolina Drug Tax, including cases raising double jeopardy claims by persons challenging their criminal convictions. This case does not involve a challenge to Milligan's criminal conviction and breaks no new legal ground. Accordingly, there is no reason for the Court to review this case, especially after denying certiorari in several other cases. *See State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App.1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, 522 U.S. 817 (1997); *Lynn v. West*, 134 F.3d 582 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998); *State v. Adams*, 513 S.E.2d 588 (N.C. Ct. App. 1999), *disc. review denied*, 350 N.C. 836, ___ S.E.2d___, *cert. denied*, ___ U.S. ___, 120 S. Ct. 534 (1999); *State v. Foster*, 519 S.E.2d 783 (N.C. Ct. App.), *disc. review denied*, 350 N.C. 840, ___ S.E.2d ___, *cert. denied*, ___ U.S. ___, 120 S. Ct. 534 (1999).

I. THIS COURT SHOULD NOT GRANT CERTIORARI IN THIS CIVIL ACTION FOR A TAX REFUND BASED ON ANY ALLEGED CONFLICT BETWEEN THE DECISIONS OF THE NORTH CAROLINA APPELLATE COURTS AND THIS COURT'S DECISION IN *DEPARTMENT OF REVENUE OF MONTANA V. KURTH RANCH*, 511 U.S. 767 (1994).

Milligan presents a case in which the only issue is whether she is entitled to a refund of taxes paid by her in an amount less than the assessment of which she was originally notified.[4] Her complaint is that, in her view, the Drug Tax she paid is actually a criminal penalty which can constitutionally be imposed only with the protections provided for criminal prosecutions. Accordingly, she claims that the Drug Tax was collected contrary to this Court's decision in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994). In that case, this Court held that Montana's drug tax was a second punishment for a criminal offense such that "[t]he proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution" and therefore "placed the Kurths in jeopardy a

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[4] The Complaint alleges that she "paid $8,000 as full payment on the Drug Tax assessment" which she alleges was in the amount of $12,252.95. Complaint, ¶¶ 19, 22, Pet. App. at 16a. For purposes of this argument, of course, the allegations are taken as true although, in a trial or summary judgment proceeding, defendants would dispute that the $8,000 was paid purely in compromise of the sole assessment she references.

second time 'for the same offense.'" *Kurth Ranch*, 511 U.S. at 784. Milligan, however, was not subjected to an independent proceeding by the State of North Carolina to collect the tax, as she paid a lesser amount in settlement following an assessment. Moreover, she ignores the differences between the North Carolina Drug Tax and the one evaluated by this Court in *Kurth Ranch*.

In *Kurth Ranch*, this Court cautioned that "[a]s a general matter, the unlawfulness of an activity does not prevent its taxation." *Kurth Ranch*, 511 U.S. at 778. Similarly, "a high tax rate and deterrent purpose . . . do not necessarily render the tax punitive." *Id.* at 781. Much more is required before a tax on the possession of drugs loses its intended character as a tax and becomes instead a criminal penalty. Two additional, "unusual features" of the Montana tax laws converted the tax in *Kurth Ranch* into a criminal penalty for double jeopardy purposes, and it was those unusual features that "set the Montana statute apart from most taxes." *Id.* First, the Montana drug tax was imposed on the commission of a crime because it was not owed unless and until the taxpayer had been arrested for criminal possession of the drugs. *Id.* Second, as a corollary to the fact that the tax was never owed until after the taxpayer's arrest, the tax was necessarily imposed only after the drugs had been confiscated and thus were no longer in the taxpayer's possession. *Id.* at 783.

In contrast to the Montana drug tax, North Carolina's Drug Tax is owed on *possession* of the requisite quantity of drugs; liability for the tax does not hinge on arrest and attaches at the time the dealer actually possesses the drugs and is payable

within forty-eight (48) hours after the dealer first possesses the drugs. N.C. GEN. STAT. §§ 105-113.107, 105-113.109, Pet. App. at 30a, 33a. Thus, in Milligan's case, she owed the Drug Tax when she was in possession of the marijuana found at her residence, prior to the time that law enforcement officers seized it and arrested her.

Because of the distinguishing features between the North Carolina tax and Montana's, the North Carolina appellate courts have consistently rejected all arguments that the Drug Tax constitutes a criminal penalty under the *Kurth Ranch* analysis. In *State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App. 1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, 522 U.S. 817 (1997), the North Carolina Court of Appeals first rejected the argument that the Drug Tax was a criminal penalty subject to double jeopardy analysis within the meaning of *Kurth Ranch*. The defendant in *Ballenger*, who was facing criminal charges for possession of marijuana with intent to sell or deliver, claimed he had already been placed in jeopardy by payment of a Drug Tax assessed against him for possession of the same marijuana. In rejecting Ballenger's double jeopardy argument, the North Carolina Court of Appeals recognized that North Carolina's drug tax, like the Montana tax, imposes an admittedly high rate of tax and serves a deterrent purpose, at least in part. The court nevertheless held that the Drug Tax was not a criminal penalty because the tax does not encompass either of the two unusual features which doomed the Montana tax. First, as noted in *Ballenger*, the Montana tax was not merely conditioned on criminal conduct; it was never owed unless and until the possessor of the drugs was arrested. As further noted in *Ballenger*, because the Montana tax was not

imposed until after the defendant was arrested and the drugs confiscated, the tax was imposed on drugs neither lawfully owned nor possessed by the taxpayer/defendant at the time the tax became due. *Kurth Ranch*, 511 U.S. at 783, *cited in Ballenger*, 472 S.E.2d at 574. In contrast, the North Carolina tax, due and owing within forty-eight (48) hours of possession,

> is not predicated upon whether the taxpayer in possession of the controlled substance has been arrested or charged with criminal conduct, nor is it assessed on property that necessarily has been confiscated or destroyed.

Ballenger, 472 S.E.2d at 574. Additionally, the North Carolina statute permits the dealer to pay the tax without revealing his identity and preserves the confidentiality of any information obtained as a result of payment. *Id.* at 575; *see also* N.C. GEN. STAT. § 105-113.108, Pet. App. at 32a; N.C. GEN. STAT. § 105-113.112, Pet. App. at 36a. Consequently, the North Carolina Court of Appeals concluded in *Ballenger*, and the North Carolina Supreme Court affirmed, that the North Carolina Drug Tax

> is a legitimate and remedial effort to recover revenue from those persons who would otherwise escape taxation when engaging in the highly profitable, but illicit and sometimes deadly activity of possessing, delivering, selling or manufacturing large quantities of controlled drugs.

Ballenger, 472 S.E.2d at 575. In several later cases, the North Carolina appellate courts have followed *Ballenger* and consistently rejected prisoners' claims of double jeopardy seeking freedom from their criminal convictions because of Drug Tax assessments. *See State v. Creason*, 473 S.E.2d 771, 772 (N.C. Ct. App. 1996), *aff'd per curiam*, 484 S.E.2d 525 (N.C. 1997); *State v. Adams*, 513 S.E.2d 588 (N.C. Ct. App. 1999), *disc. review denied*, 350 N.C. 836, ___ S.E.2d___, *cert. denied*, ___ U.S. ___, 120 S. Ct. 534 (1999); *State v. Foster*, 519 S.E.2d 783 (N.C. Ct. App.), *disc. review denied*, 350 N.C. 840, ___ S.E.2d ___, *cert. denied*, ___ U.S. ___, 120 S. Ct. 534 (1999); *State v. Woods*, 524 S.E.2d 363 (N.C. Ct. App. 2000); *State v. Wambach*, 526 S.E.2d 212 (N.C. Ct. App. 2000). The North Carolina appellate courts have thus appropriately applied *Kurth Ranch* in light of its emphasis on the significance of the "unusual features" of the Montana drug tax and have persuasively held that North Carolina's Drug Tax is not the kind of criminal penalty at issue in *Kurth Ranch*.

North Carolina's interpretation of its Drug Tax and application of *Kurth Ranch* are consistent with the decisions of numerous other state and federal courts holding similar statutes not to constitute criminal penalties. *See Covelli v. Commissioner of Revenue Servs.* ("*Covelli I*"), 668 A.2d 699 (Conn. 1995), *vacated and remanded sub nom. Covelli v. Crystal*, 518 U.S. 1031 (for further consideration in light of *United States v. Ursery*, 518 U.S. 267 (1996)), *aff'd per curiam on reconsideration, Covelli v. Commissioner of Revenue Servs.* ("*Covelli II*"), 683 A.2d 737 (Conn. 1996), *cert. denied*, *Covelli v. Crystal*, 520 U.S. 1174 (1997); *Milner v. State*, 658 So. 2d 500 (Ala. Civ. App. 1994), *cert. denied* (Ala. 1995);

State v. Lange, 531 N.W.2d 108 (Iowa 1995); *State v. Gulledge*, 896 P.2d 378 (Kan. 1995); *Commonwealth v. Bird*, 979 S.W.2d 915 (Ky. 1998), *cert. denied*, 526 U.S. 1145 (1999); *Hill v. State*, 898 P.2d 155 (Okla. Crim. App. 1995); *McMullin v. South Carolina Dep't of Revenue & Taxation*, 469 S.E.2d 600, *reh'g denied* (S.C. 1996); *see also Padavich v. Thalacker*, 162 F.3d 521 (8th Cir. 1998), *cert. denied*, 527 U.S. 1025 (1999) (holding Iowa "drug tax" is not a criminal penalty); *State v. Stubblefield*, 543 N.W.2d 743 (Neb. 1996) (distinguishing Nebraska statute from *Kurth Ranch* and holding that double jeopardy did not apply). On the other hand, several courts have held that various state "drug taxes" are criminal penalties within the scope of *Kurth Ranch*'s reasoning, often on grounds distinguishing them from North Carolina's tax. *E.g.*, *Wilson v. Department of Revenue*, 662 N.E.2d 415 (Ill. 1996) (holding that statute is written in such a way that a criminal conviction for a drug offense is necessary before one can determine that the drug tax applies);. *People v. Maurello*, 932 P.2d 851 (Colo. App. Ct. 1997) (no provision for confidential or anonymous payment, in contrast to North Carolina, Connecticut, and other states); *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995), *cert. denied*, 519 U.S. 926 (1996) (statute requiring that the tax be paid every forty-eight (48) hours); *Stennett v. State*, 941 S.W.2d 914, 916 (Tex. Crim. App. 1996), *disc. hearing denied* (Tex. Apr. 2, 1997) (legislative history establishing that "the Texas tax was plainly and undoubtedly intended to be a punishment by the legislature that enacted it"); *accord Ex parte Ward*, 964 S.W.2d 617 (Tex. Crim. App.), *cert. denied*, 525 U.S. 823 (1998). *See also Desimone v. State*, 904 P.2d 1 (Nev. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *affirmed on remand*, 996 P.2d 405 (Nev. 2000);

Commissioner of Revenue v. Mullins, 702 N.E.2d 1 (Mass. 1998); *Brunner v. Collection Div. of the Utah State Tax Comm'n*, 945 P.2d 687 (Utah 1997).

In sum, North Carolina's decisions holding that its Drug Tax is not a criminal penalty are consistent with the decisions of many other courts addressing similar statutes. Because the North Carolina Drug Tax is highly distinguishable from the Montana tax at issue in *Kurth Ranch*, the decision in this case and the cases on which it relied, such as *Ballenger*, are in no way in conflict with *Kurth Ranch*. Milligan has offered the Court no good reason justifying the granting of the writ of certiorari in this case, and the Petition should therefore be denied.

II. THIS COURT SHOULD NOT GRANT CERTIORARI BASED ON THE ALLEGED CONFLICT BETWEEN THE NORTH CAROLINA APPELLATE COURT DECISIONS AND THOSE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Milligan contends that this Court should grant its writ of certiorari because the North Carolina Court of Appeals decisions in her case, and in other cases involving the Drug Tax, conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Lynn v. West*, 134 F.3d 582 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998). She claims both that there is a direct conflict between her case and *Lynn*, which this Court supposedly needs to resolve, and also that this Court needs to

settle an alleged uncertainty as to whether state courts are required to follow the decisions of circuit courts of appeals which rule on cases from their states. On neither basis, however, has Milligan presented a good reason for this Court to grant certiorari.

A. THIS CASE AND *LYNN V. WEST* DO NOT PRESENT A CONFLICT SUCH THAT THIS COURT SHOULD GRANT ITS WRIT OF CERTIORARI.

Milligan would have the Court treat this case as directly in conflict with *Lynn* so that certiorari would be appropriate to address the conflict. Defendants, of course, submit that *Lynn* was itself incorrectly decided, but that the Court need not address that problem in this case, which was correctly decided by the North Carolina courts. In addition, Milligan ignores the fact that her case is significantly different from *Lynn* and does not present the type of direct conflict that led the Court to decide *Kurth Ranch*. In *Kurth Ranch*, this Court was dealing with a conflict between state and federal court decisions involving the same taxes on the same parties. Milligan cannot claim such a direct conflict as her claim to a tax refund has not been, and could not be, litigated in federal court. (The Eleventh Amendment would bar any refund claim brought in federal court, and the State is not seeking to collect further taxes from her.) Moreover, Lynn sought to protect himself from state proceedings to seize further assets in satisfaction of a Drug Tax assessment while Milligan seeks to obtain a refund of a tax she paid in settlement of a larger assessment.

This case differs from *Lynn* in other ways. Milligan, of course, was assessed taxes as a dealer in marijuana. *See* Complaint, ¶ 19, Pet. App. at 16a. She was also charged with a penalty of 50% of the assessment based on the statute applicable in 1996. *See* N.C. GEN. STAT. § 105-113.110A (1995), Pet. App. at 34a. In contrast, *Lynn* dealt with cocaine, with its separate tax provisions, and a penalty in the amount of 100% of the tax under the statute applicable at that time. *Lynn*, 134 F.3d at 584, 590.[5] That penalty has since been further reduced so there is now no special penalty for failure to pay the Drug Tax; instead, the penalty is ten per cent (10%), the same penalty generally applicable under North Carolina law for failure to pay taxes in a timely manner. N.C. GEN. STAT. §§ 105-113.110A and 105-236 (1999), App. at 1a, 3a.

Clearly, Milligan's case is substantially different from *Lynn*. It differs even more from the other cases in which this Court has chosen not to grant review, cases in which double jeopardy issues were raised challenging criminal convictions and punishments. *See State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App. 1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, 522 U.S. 817 (1997); *State v. Adams*, 513 S.E.2d 588 (1999), *disc. review denied*, 350 N.C. 836, ___ S.E.2d___,

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[5] In *Lynn* the Court of Appeals concluded that the tax was extremely high in relation to the value of the cocaine. 134 F.3d at 590. In both *Lynn* and this case, because they were decided at the trial level on motions to dismiss, there was no evidence in the record as to the value of the drugs in relation to the tax. In *Lynn*, however, the Court of Appeals sought to attach a value based on other cases, *id.*, a value which defendants never had a chance to disprove.

cert. denied, ___ U.S. ___, 120 S. Ct. 534 (1999); *State v. Foster*, 519 S.E.2d 783 (N.C. Ct. App.), *disc. review denied*, 350 N.C. 840, ___ S.E.2d ___, *cert. denied*, ___ U.S. ___, 120 S. Ct. 534 (1999). In all those cases, the issue of whether the Drug Tax constitutes a criminal penalty was presented far more concretely than in this case, yet the Court chose not to disturb those decisions. Milligan's tax refund action on her partially paid assessment does not offer the Court a sharp delineation of the issues or the direct conflict with *Lynn* that she claims. Accordingly, the differences between this case, and other North Carolina cases, and *Lynn*, offer no basis for this Court to grant its writ of certiorari in this case.

B. NORTH CAROLINA WAS NOT REQUIRED TO FOLLOW THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN *LYNN*.

Milligan suggests that this Court should grant certiorari in order to resolve a perceived issue of whether the Supremacy Clause requires the North Carolina Supreme Court to follow decisions of the United States Court of Appeals for the Fourth Circuit. No such issue exists for this Court to resolve. The Supremacy Clause of Article VI, § 2 of the Constitution dictates that state courts' judges "shall be bound" by "the supreme law of the land," comprised of the Constitution, plus the laws and treaties of the United States. And it is this Court which has long been established as the final arbiter of the "supreme law of the land." *E.g.*, *Marbury v. Madison*, 1 Cranch 137 (1803). Federal district and circuit courts do not enjoy that status. Nor is their authority to interpret the Constitution superior to that of

the North Carolina courts. Instead, North Carolina's courts are *equally entitled "to render binding judicial decisions that rest on* their own interpretations of federal law." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). "In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located." *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring). In the unanimous decision of *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997), Justice Thomas' explanation of this principle was cited with approval for the proposition that the "Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law." Contrary to the assertions made in Milligan's Petition, then, this Court need not and should not grant certiorari to "resolve whether state courts are bound to follow circuit court decisions on matters of federal constitutional law." Petition, p. 16. Plainly, the Supremacy Clause does not dictate that North Carolina courts, or the courts of any other state, are required to follow the decisions of federal circuit courts of appeals, and this non-issue does not justify the granting of this Court's writ of certiorari.

CONCLUSION

Petitioner has offered no compelling reason for this Court to grant its writ of certiorari, and the Petition should be denied.

Respectfully submitted,

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July 5, 2000

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APPENDIX
TABLE OF CONTENTS

North Carolina General Statutes § 105-113.110A. Administration. (current) 1a

North Carolina General Statutes § 105-236. Penalties. (current) 3a

North Carolina General Statutes § 105-267. Taxes to be Paid; Suits for Recovery of Taxes. (1996) 5a

Defendant's Motion for a Stay of Discovery and Protective Order Pursuant to Rule 26(c) of the Rules of Civil Procedure 7a

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North Carolina General Statutes § 105-113.110A. Administration. (current)

Article 9 of this Chapter applies to this Article. (1989 (Reg. Sess., 1990), c. 814, s. 7; 1995, c. 340, s. 1; 1997, c. 292, s. 1; 1998-218, s. 2.)

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North Carolina General Statutes § 105-236.
Penalties. (current)

Penalties assessed by the Secretary under this Subchapter are assessed as an additional tax. Except as otherwise provided by law, and subject to the provisions of G.S. 105-237, the following penalties shall be applicable:

* * *

(4) Failure to Pay Tax When Due. -- In the case of failure to pay any tax when due, without intent to evade the tax, the Secretary shall assess a penalty equal to ten percent (10%) of the tax, except that the penalty shall in no event be less than five dollars ($5.00). This penalty does not apply in any of the following circumstances:

a. When the amount of tax shown as due on an amended return is paid when the return is filed.

b. When a tax due but not shown on a return is assessed by the Secretary and is paid within 30 days after the date of the proposed notice of assessment of the tax.

* * *

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North Carolina General Statutes § 105-267. Taxes to be Paid; Suits for Recovery of Taxes. (1996)

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person has a valid defense to the enforcement of the collection of a tax, the person shall pay the tax to the proper officer, and that payment shall be without prejudice to any defense of rights the person may have regarding the tax. At any time within the applicable protest period, the taxpayer may demand a refund of the tax paid in writing from the Secretary and if the tax is not refunded within 90 days thereafter, may sue the Secretary in the courts of the State for the amount demanded. The protest period for a tax levied in Article 2A, 2B, 2C, or 2D of this Chapter is 30 days after payment. The protest period for all other taxes is one year after payment.

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DEFENDANTS' MOTION FOR A STAY OF DISCOVERY AND PROTECTIVE ORDER PURSUANT TO RULE 26(c) OF THE RULES OF CIVIL PROCEDURE

[Filed: August 10, 1998]

[Caption omitted in printing.]

NOW COME the defendants to the above-captioned case, by and through their undersigned counsel, and move the Court for a stay of discovery and a protective order protecting them from being required to respond to plaintiff's attempted discovery unless and until such time as the Court has determined that defendants' motion to dismiss should be denied and that plaintiff is not individually barred from pursuing her claim. In support whereof, defendants show unto the Court the following:

1. Plaintiff brought this action pursuant to N.C. Gen. Stat. § 105-267, seeking a refund of "drug taxes" collected by the Department of Revenue under the North Carolina Controlled Substances Act, N.C. Gen. Stat. § 105-113.105 *et seq.*

2. Plaintiff's claim depends on whether she can successfully convince the Court of her theory that the "drug tax" is in reality a criminal penalty.

3. For reasons set out in DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, plaintiff cannot

succeed on her contention that the drug tax is in reality a criminal penalty.

4. Even if plaintiff could succeed on her contention that the drug tax is in reality a criminal penalty, defendants have several additional defenses against plaintiff's individual claim, defenses which may bar her from pursuing her own claim. These defenses include whether she in fact made a timely demand under N.C. Gen. Stat. § 105-267, which is necessary to permit her to institute this suit challenging the validity of the drug tax and seeking refunds. These defenses also may include whether plaintiff has in effect waived her right to challenge the drug tax assessed against her by reaching a voluntary settlement of the assessment.

5. Plaintiff has served on defendants Plaintiffs' First Set Of Interrogatories To Defendants (Exhibit A attached hereto), a Request For Production Of Documents (Exhibit B attached hereto), and a Request For Admissions (Exhibit C attached hereto). These requests are highly burdensome. In particular, the interrogatories seek a list of all taxpayers who have paid money or anything else of value pursuant to the North Carolina Controlled Substance Drug Tax, with each taxpayer's full name, last known address and telephone number, social security number, AN number, date and amount of the drug tax assessment, and the amount and date of any payment. The request for production of documents seeks production of all documents showing the above information as to each taxpayer who paid any money or anything else of value pursuant to the drug tax. As there may have been as many as ____ taxpayers who have had drug taxes assessed against them, the task of searching out, compiling, and producing the

information and documents sought would be extremely burdensome upon defendants and should not be required unnecessarily.

6. If plaintiff's action is dismissed as to her individual claim, or if she is barred from going forward as to her individual claim for failure to comply with N.C. Gen. Stat. § 105-267 or because she has waived her right to pursue this claim, she could not represent a class of alleged drug taxpayers. Consequently, defendants should not be required to undertake the highly burdensome task of responding to plaintiff's discovery, especially as it relates to potential class members, unless and until she, first, survives defendants' motion to dismiss and, second, survives defendants' subsequent motion, if necessary, concerning possible barriers to plaintiff proceeding with her individual claim.

7. Plaintiff's discovery requests also should be stayed because she is not entitled to receive the information she has sought concerning taxpayers who have not made themselves parties to this suit and who have not consented to her obtaining information about their tax status. Under N.C. Gen. Stat. § 105-259, defendants are prohibited from revealing tax information "from any source concerning the liability of any taxpayer for a tax" as defined in N.C. Gen. Stat. § 105-228.90. Under N.C. Gen. Stat. § 105-228.90, a tax includes any tax levied under Subchapters I, V, and VIII of Chapter 105 of the General Statutes. The drug tax imposed in N.C. Gen. Stat. § 105-113.105 *et seq.* falls within Subchapter I of Chapter 105 of the General Statutes. Consequently, defendants are forbidden to reveal the information sought by plaintiff except under certain circumstances, such as a court order, none of

which are applicable here. *See* N.C. Gen. Stat. § 105-259(b). Thus, this Court should stay plaintiff's discovery request because she seeks confidential information about taxpayers who have not consented to her having that information. Information about individual taxpayers should only be required from defendants if plaintiff first survives the obstacles to her proceeding with her individual claim and then only under an appropriate court order which limits the information sought. Such a limitation should reduce the burden on the defendants as to what information should be made available and should restrict plaintiff's request to those taxpayers whose claims would not be time-barred. Further, if defendants are required to provide such information at all, it should only be under restrictions of confidentiality as ordered by this Court to comply with N.C. Gen. Stat. § 105-259 and to protect the confidentiality of the potential class members.

WHEREFORE, defendants urge this Court to stay all discovery sought by plaintiff, including Plaintiffs' First Set Of Interrogatories To Defendants, plaintiff's Request For Production Of Documents, and plaintiff's Request For Admissions pending determination of defendants' motion to dismiss and, should the Court deny the motion to dismiss, determination of other issues concerning plaintiff's entitlement to bring this lawsuit. Moreover, the Court should enter a protective order staying plaintiff's discovery requests until after determination of the issues concerning her right to pursue this litigation and then allowing the discovery only upon entry of a proper subsequent protective order limiting the requests to potential class members, limiting the information to be concerning individual taxpayers, and protecting the

confidentiality of that information in the possession of plaintiff and her counsel.

Respectfully submitted, this the 10th day of August, 1998.

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